A present to me from Wm Cruise Esquire. Francis Hargrave 5. March 1801.

IRISH REPORTS;

15. 2i.

OR,

REPORTS OF CASES

DETERMINED IN THE

King's Courts, Dublin;

WITH SELECT CASES IN THE

HOUSE OF LORDS OF IRELAND.

MUSEUM BRITANNICUM

VOL. I.

BEGINNING WITH TRINITY TERM, 1786, 26 GEO. III. AND ENDING WITH TRINITY TERM, 1788, 28 GEO. III.

BY

G. W. VERNON, and J. B. SCRIVEN, ESQRS.

BARRISTERS at LAW.

K

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MDCCXC.

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MVSEVM
BRITANNICVM

PREFACE.

TO endeavour to recommend this publication, which may be conſidered as the firſt attempt towards a regular report of judicial determinations in *Ireland*, by any obſervations on the public advantages of Reports in general, would be an uſeleſs parade of words: by the learned profeſſion, to whoſe candour and indulgence this is ſubmitted, the utility of them is well known, and univerſally acknowledged. It will be ſufficient therefore to confine the prefatory obſervations that may be expected on this occaſion, to this publication in particular, and the ſubject of thoſe remarks which it may probably excite. It will be aſked, how came it that no ſuch attempt has hitherto been made? Why have we ventured on a work, the novelty of which in this kingdom, muſt render it more particularly the ſubject of criticiſm? With regard to this eſſay in general, we are too conſcious of

of its inferiority in execution to ſuch, as from time to time, make their appearance in *Great-Britain*, not to throw ourſelves on the indulgence of our learned brethren, and to endeavour to apologize in ſome degree for its imperfection, by thoſe reaſons which ſeem to us hitherto to have prevented ſuch an attempt. Sir *John Davis*, who publiſhed ſome ſelect caſes in the year 1615, ſtiles his the firſt report of caſes ariſing in *Ireland*, and ruled in our courts of juſtice. He remarks in his preface, that though the laws of *England* had prevailed in this kingdom upwards of four hundred years, there had not been any report of caſes adjudged in *Ireland*. This he conſiders the more ſtrange, becauſe there had been within this realm, in every age ſince the reign of King *John*, eminent men who had derived their knowledge of the laws from the courts in *England*, and therefore might have been induced to imitate the learned men of that kingdom, who from the *Norman* conqueſt, did continually preſerve the memory of important caſes, by collecting them into books of *Reports*, which, he obſerves, may with propriety be called the *Annals of the Law*. One principal reaſon of his work he declares to be

be to incite others in this kingdom, to perform the like ſervice to poſterity; but we do not find that his publication was attended with the effect he propoſed; for the next *Iriſh* caſes that have appeared in print, are a few in the time of *Geo.* I. annexed to *Gilbert's Caſes in Equity*; a poſthumous publication! From that time to the day on which this production is offered to the public, no Report of *Iriſh* caſes has appeared. *Howard's Popery Caſes*, and ſome that are to be found in his books of practice, will ſcarcely be conſidered as an exception. Sir *John Davis*, though he has remarked, yet has not aſſigned any reaſon for, this neglect in the *Iriſh* barriſters, of a matter of ſuch obvious moment to the profeſſion, and to the intereſts of the public. We cannot conceive that it aroſe merely from accident, particularly after he had ſet an example ſo worthy of imitation. It will not, perhaps, be thought preſumptuous in us, to endeavour to aſſign the reaſon, as the difficulties we have met with do neceſſarily ſuggeſt it. The number of courts is the ſame here as in *England*; the buſineſs tranſacted in them conſiderably leſs: to account for this, we need only reflect on the

comparative

comparative extent, population and commerce of the two countries. The natural conſequence of this deficiency of buſineſs, was, that individuals, eminent in their profeſſion, did not find ſufficient employment to attach them to a particular court; ſo that they were obliged to appear in different courts, according as the cauſes they were engaged in happened to be called on; and thus the courſe of practice continues at this day. Hence frequently it may be, that a counſel hears no more of a cauſe than his own argument, or at the utmoſt not ſufficient to enable him to make a tolerable report of it. To this practice too, may be attributed the employment in each caſe of a greater number of counſel than in England, in order to guard againſt interruptions from their abſence. The difficulties of reporting under theſe circumſtances, might appear ſufficient to deter from the undertaking. There are ſome too, who upon political grounds, have objected to the undertaking of ſuch a work in this kingdom. But their objections do not ſeem warranted to the extent in which they are applied. The Deciſions in England muſt ever have their due weight in our courts,

courts, as far as they apply; and where they do not, as muſt frequently happen from time to time, in caſes peculiar to this country, it ſeems unqueſtionable that the determinations of ſuch in our own courts ſhould be generally known, and reſcued from oblivion. The great number of ſtatutes confined to this country, the tenures that are peculiar to it, and the rules of practice which each court preſcribes to itſelf, afford abundant matter to juſtify a compilation of this nature. To evince that ſuch a work is neceſſary, we have only to appeal to the experience and obſervation of the profeſſion. In numberleſs inſtances, and caſes of importance, counſel are obliged to refer to memory for determinations of which more permanent traces are not to be found. In matters of practice, upon which ſo much of the buſineſs of a court depends, the inconvenience is more frequently, and more ſenſibly felt. For theſe reaſons we are not without hopes that this publication will be acceptable to the profeſſion; and theſe we are the rather inclined to entertain, as the work has been undertaken at the ſuggeſtion of ſome of the moſt eminent men of the bar; and the very

very flattering reception that the idea of it has obtained, from perſons whoſe opinion muſt outweigh every other conſideration, has induced us to perſevere, and endeavour to ſurmount the difficulties that impede it. With this view we have united our efforts and attention in collecting ſuch materials for this compilation as have fallen under our own obſervation, and to hazard a publication of notes which we had at firſt begun to take for our private information. As the uniting of our labours is neceſſary, in order to guard againſt interruption, ſo it muſt contribute in a great degree to render the work leſs liable to inaccuracy; and it is no ſmall ſatisfaction to us that thoſe to whom we conſidered it as our duty to ſubmit our manuſcript have thought it deſerving of their approbation.

Our deſire to preſerve as many caſes as we could, will account for the miſcellaneous collection of theſe now inſerted, and of thoſe that may be hereafter offered to the public. When the work ſhall have aſſumed a ſize ſufficient for a volume; proper indexes ſhall be annexed for the purpoſe of arranging and referring to the matter. We have thought, that taking in

the

the cases determined by the House of Lords, would not be an unacceptable extension of our plan, as originally conceived; more especially as the determinations of the court of *dernier resort* must establish the law of the land, and the grounds of them are not always to be found, at least not sufficiently pointed out, in the printed cases; which, as our own observation warrants us to assert, even for a statement of facts, cannot be implicitly relied on. It may be proper to observe, that we do not profess to give all the cases that occur in the Lords; many of them must necessarily occur, so peculiarly resting on their own circumstances, as not to afford any information of general utility. In making the selection we do not mean to be directed, solely by our own discretion.

Should this attempt meet with approbation; it is our design to continue the publication from time to time; the executing of which, must depend upon the occurrence of materials for the purpose, and the time that we can spare from the duties of our profession.

The EDITORS.

List of the JUDGES *at the time, when these* Cases *commence.*

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Third Serjeant—John Toler, Eſq. *ſucceeded by* the Hon. Joſeph Hewitt. *Page* 242.
Recorder of the City of Dublin—Denis George, Eſq.

INDEX

OF THE

CASES REPORTED.

A.

ADAMS *and* Gould *Page* 258
Agar *v.* Bowers 119
Aherne, Barry *v.* 475
Anderſon *& al'*, Sutor *v.* 395
Archdall, Crawley *v.* 203
——— *v.* Montgomery 302
Archdeken, Keefe *v.* 195
Armſtrong *v.* Dillon 294
Athy *v.* Skerret 396
Atkinſon *v.* Pilſworth 157
Attorney General *v.* Paulin 123
Auſtin, Sweet *& ux'* *v.* 306. 314
Aylmer *v.* Bellew 15
——— *& ux'*, Davis's executor *v.* 105. 301
Ayre, Manſell *v.* 315

B

Baker, Lindſay *v.* 118, 120
Balfour's leſſee, *v.* caſual ejector 98
Barnewell & al', Lord Trimleſton's leſſee *v.* *Page* 215
Barry *v.* Aherne 475
——— *v.* Darran 105
———, White *v.* 237
———, Conran v. 111
———'s Executors, Lord Middleton *v.* 81
Baxter's leſſee *v.* Clements 263
Bayly *v.* Creagh 313
Bell *v.* Clarke 256
Bellew, Aylmer *v.* 15
Bernard's leſſee *v.* Browrigge 258
Beſt, Sibthorp & Colles's leſſee, *v.* *n.* 233
Blackiſton *v.* Rochfort 477
Blake, Lynch *v.* 478
Blizard *v* Corry 305
Blood, M'Nemara & al' *v.* 124
Boddy, Greville *v.* 374
Bodkin *v.* Kealy 303
Bowen's leſſee *v.* Read 240
Bowerman *v.* Nettles 475
——— Wheeler *v.* 238
Bowers, Agar *v.* 119

Boyle *v.* administrators of Wrixon *Page* 135
—— Freeman's lessee *v.* 402
—— *v.* Freeman's lessee 436
Braningen, Windys *v.* 87
Brewer, Humphreys *v.* 386
Brian *v.* Brian 84
Brooke's executor, Kilbee *v.* 230
Browne, Willock & Johnson's lessee *v.* 388
Brownlow *v.* Duke of Chandos 109
Brownrigge, Bernard's lessee *v.* 258
Burford, Davis *v.* 395
Burroughs *v.* Tape 214
—— lessee *v.* Cottingham 476
Burton *v.* Blood 124
Butler, Roth *v.* 85
—— Prettie's lessee *v.* 231

—

C.

Cahill *v.* M'Neale 308
Callagher *v.* Poe 396
Carbery Lord *v.* Mansell 112
Carmichael, Lane *v.* 380
Carson, Ingham *v.* 88
Cassan *v.* Palmer 400
Casson *v.* Sankey & Trevor 220
Castles *v.* Merchant 212
Chandos Duke of, Brownlow *v.* 109
Clark, Bell *v* 256
Clements, Baxter's lessee *v.* 263
Cochran *v.* Spillar 468
Colson, Cross *v.* 480, 481
Conran *v.* Barry 111
Cooper *v.* Fleming 387
Cope and Jones 29
Copperthwaite, Fleetwood *v.* *Page* 99
Cork, corporation of, 's case 120
Corrigan, M'Cusker's lessee *v.* 236
Corry, Blizard *v.* 305
Cosgrave, Morgan *v.* 87
Cottingham, Burroughs's lessee *v.* 476
Cowan, Herdman *v.* 93
Cox, Lockwood *v.* 77
—— *v.* Osborn 107
Crawley *v.* Archdall 203
Creagh, Bayley *v.* 313
Crocket *v.* Montgomery 473
Cross *v.* Colson 480, 481
Cunningham *v.* Shearman 312
Cuthbert, Jones *v.* 505

—

D.

Daly, *Ex parte* 499
Darquier *v.* England 307, 318
Darran, Barry *v.* 105
Davies *v.* Reeves & *ux'* 497
Davis *v.* Burford 395
——'s executor *v.* Aylmer & *ux'* 105 301
D'Esterre's lessee *v.* Hart 229
Devonsher *and* Newenham & *al'* 319. 482
Dillon & *al' v.* Blood 124
—— Armstrong *v.* 294
Dixon (*erroneously* Nixon) Lewis *v.* 301
—— *v.* Fuller 465
Dodd, King *v.* 307
Domville's lessee *v.* Towson 292
Drew *v.* Spencer 116

E.

Edwards v. Harding *Page* 99
Ejector caſual, Balfour's leſſee v. 98
——— Montgomery's v. 104
——— Stannard's v. 236
England, Darquier v. 307. 318
Engliſh, O'Brien v. 242. 386
Euſtace v. Purcell 603

F.

Fay v. M'Clenaghan 241
Finlay, Keogh's leſſee v. *n.* 234
Fitzgerald, Shee v. 114
Fleetwood v. Copperthwaite 99
Fleming, Cooper v. 387
———, Gill v. 385
Forbes, Paul v. 376
Fotteral v. O'Brien 309
Fox v. Moſſom 388
Foy, The King v. 540
Freeman's leſſee v. Boyle 402
———, Boyle v. 436
French v. Langriſhe 361
Fuller, Dixon v. 465

G.

Gill v. Fleming 285
Glerawly, Lord, v. Magee 260
Gore, Kilbee v. 239
Gorman's executrix v. Mountgarret 111
Gould and Adams 258
Graham v. Kennedy 125. 400
——— v. Whittington 292
Greville v. Boddy 374
Grierſon, *ex parte* v. Walſh 239
Griffith, The King v. 612

H.

Haire v. Lloyd *Page* 127
Hamilton v. Johnſon 394
——— v. O'Brien 314
——— v. Wright 383
———, Skerrett & Warren v. 311
Hampton v. Hampton &al' v. 514
Harding, Edwards v. 99
———, Upton v. 397
Hart, D'Eſterre's leſſee v. 229
Henry, Stewart v. 49
Herdman v. Cowan 93
Hoare, Murphy v. 92
Humphreys v. Brewer 386

I.

Ingham v. Carſon 88

J.

Johnſon's aſſignee v. Langriſhe 361
———'s leſſee v. Brown 388
———, Hamilton v. 394
——— v. Nugent 491
Jones *and* Cope 29
——— v. Cuthbert 505

K.

Kealy, Bodkin v. 303
Keefe v. Archdeken 195
Kelly v. Quin 256
——— Quidihy v. 515
Kenmare, Lord, v. Supple's leſſee, 1
Kennedy, Graham v. 125. 400

Kennedy's adminiſtrator, Ingham v. *Page* 88
Keogh v. Wood 113
Keogh
Keogh, Mahon, v. 478
——'s leſſee v. Finlay *n.* 334
Kilbee v. Gore 230
King v. Dodd 307
The King v. Caſhell 317
—— v. Foy 540
—— v. Griffith 612
—— v. Mauclerk 299
—— v. Read 295
—— v. Sheriff of *Antrim* 317
—— v. Underwood 117
—— on information of Coleman 82
Kolb, Schoales & al' v. 522

L.

Lamey's aſſignee v. Kennedy 125. 400
Lane v. Carmichael 380
Langriſhe, French & al' v. 361
Le Hunt's Executors v. Murphy 107
Leland's Executor, Wyndyſs v. 87
Lewis v. Dixon 301
Lindſey v. Baker 118. 120
Lloyd, Haire v. 127
——, Woods v. 315
Lockwood v. Cox 77
Lodge, Ryan v. 316
Long v. Barnewal & *al* 215
Lynch v. Blake 478
—— v. Lynch 241

M.

M'Anally, Scot v. 60
M'Clenaghan, Fay v. *Page* 241
M'Cuſker's leſſee v. Corrigan 236
M'Neale, Cahil v. 308
M'Nemara v. Blood 124
Magee, Lord Glerawly v. 260
Magrath v. Lord Muſkerry 166
Mahon v. Odlum 317. 479
Mahon v. Keogh 478
Manſell v. Ayre 315
——, Lord Carbery v. 112
Mauclerk, The King v. 260
Merchant, Caſtles v. 212
Middleton, Lord v. Executors of Barry 81
Mitchel, Sutor v. 395
Montgomery's leſſee v. caſual ejector 104
——, Archdall v. 302
——, Crocket v. 473
Moony, Ward v. 480
Moore v. Moore 224
Morgan v. Coſgrave 87
Moſſom, Fox v. 387
Mountgarret, Lord, Gorman's executrix v. 111
Murphy v. Hoare 92
——, Le Hunt's Executors v. 107
Muſkerry, Lord, Magrath v. 166

N.

Nettles, Bowerman v. 475
Newenham *and* Devonſher 319. 482
Nicholſon, Ormſby v. 115. 311
Nixon (Dixon *properly*) Lewis, v. 301
Noble, Stewart v. 528
Nugent, Johnſon v. 401

O.

O'Brien v. Engliſh *Page* 242. 386
——— Purdon's leſſee v. 194
——— Fotteral v. 309
——— Hamilton v. 314
Odea v. Lord Mountgarret 111
Odlum Mahon v. 317. 479
——— Taylor v. 400
Ormſby v. Nicholſon 115. 311
Orr v. Vipon 243
Oſborn, Cox v. 107

P.

Palmer, Caſſan v. 400
Paul v. Forbes 376
Paulin Attorney General v. 123
Penroſe and Reeves 319. 482
Pilſworth, Atkinſon v. 157
Poe Callagher v. 396
Prettie's leſſee v. Butler 231
Prior Semple v. 116. 310
Purcel, Euſtace v. 603
Purdon's leſſee v. O Brien 194

Q.

Quidihy v. Kelly 515
Quinn, Kelly v. 256

R.

Read, Bowen's leſſee v. 240
——, The King v. 295
Reeves and Devonſher 319. 482
——— Davies v. 497
Rice v. Rice 107
Rochfort Blackiſton, v. *Page* 477
Roth v. Butler 85
Ruſſel v. Tew 399
Ryan v. Lodge 316

S

Sankey, Caſſon v. 220
Saunders Wenſell v. 393
Schoales v. Kolb 522
Scot v. M'Anally 60
Semple v. Prior 116. 310
Shaw v. Shaw 607
Shearman, Cunningham v. 312
Shee v. Fitzgerald 114
Sibthorp & Colles's leſſee v. Beſt *n.* 233
Skerret v. Hamilton 311
———, Athy v. 396
Spencer, Drew v. 116
Spillar, Cochran v. 468
Stanhope, Lord, Woodward v. 106
Stannard's leſſee v. Ejector 236
Steele's executrix v. Steele 114
Stewart v. Henry 49
——— v. Noble 528
Supple's leſſee, Lord Kenmare v. 1
Sutor v. Mitchel 395
Sweet v. Auſtin 306. 314

T.

Tallon, Wybrants v. 268
Tape Burroughs v. 214
Taylor v. Odlum 400
Templeton Ward v. 123
Tew, Ruſſel v. 399

Towſon,

Towſon, Domville's leſſee v. 292
Trevor, Caſſon v. 220
Trimleſton's, Lord, leſſee v. Barnewall 215

U.

Underwood, The King v. 117
Upton v. Harding 397

V.

Vipon, Orr v. 243

W.

Walſh, Grierſon v. 239
Ward v. Moony *Page* 480
—— v. Templeton 123
Warren v. Hamilton 311
Watkins v. Watkins 61
Wenſel v. Saunders 393
Wheeler v. Bowerman 238
White v. Barry 237
Whittington, Graham v. 292
Willock's leſſee v. Browne 388
Wood, Keogh v. 113
Woods v. Lloyd 315
Woodward v. Lord Stanhope 106
Wright, Hamilton v. 383
Wrixon's adminiſtrators, Boyle v. 135
Wybrants v. Tallon 268
Wyly, *ex parte* 518
Wyndyſs v. Braningen 87

TABLE

TABLE

OF THE

UNREPORTED

CASES CITED.

B.

BATEMAN, Murray *v.* *Page* 145. 152. 154. 155. 176. 177.
Bindon, Reeves *v.* 123
Bingley's case 300
Bleſſington, Lord, Munſell *v.* 181. 186
Blunt, The King *v.* 297
Boyle, Freeman *v.* 152
Burke *and* O Hara 181

C.

Clonmore, Lord, Pilſworth *v.* 180
———, Ryan *v.* 178. 180
Coſtello, Metge's leſſee *v.* 100

D.

Dogherty, The King *v.* 548

E.

Eſkildſon *v.* Fitzgerald 387

F.

Fitzgerald, Eſkildſon *v.* 387
Freeman *v.* Boyle 152

G.

Graham *v.* Pleydell 9

H.

Hamilton *and* Kane 178

J.

Jones *v.* O'Neil 181

K.

Kane *and* Hamilton 178
The King *v.* Blunt 297
——— *v.* Dogherty 548
——— *v.* Kubbage 297
——— *v.* Muſgrave 297
——— *v.* Mulligan & Standrin 601

The King

The King *v.* Parker *Page* 297
——— *v.* Reilly 297

M.

Metge's leſſee *v.* Coſtello 100
Mulligan, The King *v.* 61
Munſell *and* Lord Bleſſington 181. 186
Murray *v.* Bateman 145, 152. 154, 155. 176. 177
Muſgrave, The King *v.* 297

O.

O'Hara *and* Burke 181
O'Neil, Jones *v.* 181

P.

Parker, The King *v.* *Page* 297
Pilſworth . Lord Clonmore 180
Pleydell, Graham *v.* 9

R.

Reeves *v.* Bindon 123
Reilly, The King *v.* 297
Ryan *v.* Lord Clonmore 178. 180

S.

Standrin, The King *v.* 601
Stannus's caſe 316

CASES

DETERMINED IN THE

King's Courts, Dublin.

Trinity Term

26 Geo. III. 1786.

Exchequer Chamber.

Sir Thomas Browne, commonly called Lord Kenmare, and Sir Boyle Roche, Plaintiffs, in Error.—John Magee, Leſſee of James Supple, Defendant.

Kenmare *againſt* leſſee of Supple, in error.

THIS was an ejectment upon the title, tried at *Tralee*, before Mr. *Baron Hamilton*; to whoſe opinion a bill of exceptions hav-

In ejectment for non-payment of rent, judgment by default and execution executed, the arrear having been aſcertained by affidavit before a commiſſioner, are good, and deprive the tenant of a right of entry. *Tender* of the coſts and arrear, within ſix months after the execution, does not give the tenant a right to enter: He muſt within ſix months, either actually *pay* the arrears and coſts, or depoſit them in a court of equity on filing a bill; otherwiſe, he is for ever barred and foreclоſed.

Kenmare *againſt* leſſee of Supple, in error.

ing been taken, error was thereupon aſſigned in this court. From the bill of exceptions it appeared, that Lord *Kenmare* being ſeized in fee of the lands in queſtion, had on the 1ſt of Auguſt, 1760, demiſed them to *Supple* for his life: that Lord *Kenmare* had brought an ejectment in *B. R.* againſt him, for non-payment of rent; and obtained judgment by default, as of Hillary term, 1774; and the *habere* thereon, was executed 15th March, 1774. The rent in arrear had been aſcertained by the affidavit of *Ellen Galway*, the agent and receiver to Lord *Kenmare*, ſworn before a commiſſioner in the country, and not by order of the court. Within ſix months after the execution of the *habere*, *Supple tendered* to *Ellen Galway*, the rent aſcertained due by her affidavit, together with the coſts of the judgment and ejectment, which ſhe refuſed to accept and kept *Supple* out of poſſeſſion (to recover which the preſent ejectment was brought). The judge was of opinion, that the leſſor of the plaintiff's having *tendered* the rent in arrear, and the coſts to the agent of Lord *Kenmare* within ſix months, gave him a right of entry, and, therefore, that the ejectment was well maintained. A verdict was accordingly found for the plaintiff, and judgment was entered in *Scac.* Eaſter term, 1785. To that opinion the defendant's counſel tendered a bill of exceptions, which was argued before the Court of Exchequer-Chamber, in Eaſter term 1786; and two queſtions aroſe upon the opinion of the judge, that the right of entry was in *Supple.*

Firſt, Whether the judgment in ejectment in 1774, having been by default, and the rent having been aſcertained by affidavit of Lord *Kenmare's*

Kenmare's agent, ſworn before a commiſſioner and not by rule of court, was not a nullity, and of courſe the *habere* grounded upon it of no effect. Kenmare *againſt* leſſee of Supple, in error.

Secondly, Whether (though that judgment had been regular and good) the tender of the rent and coſts within the time limited by ſtatute was not, upon the true and generally adopted conſtruction of the ſtatutes to inforce the payment of rent, (11 Anne and 4 G) alone ſufficient to give *Supple* a right of entry and a legal title to maintain an ejectment.

Lord *Earlsfort*, Ld. Ch. J. of *B. R.*—(having ſtated the caſe at length and the queſtions that aroſe on the Judges charge.)—As the ſecond queſtion is of greateſt extent and moſt general influence, and ſeems to have been the only one made below, or in the contemplation of the judge who tried the ejectment: I will go to that, as the main queſtion, firſt.

But before I go into any explanation of theſe acts, I would obſerve, that it avails little, what would have been the caſe between landlord and tenant at common law. Where men are to conform to poſitive ſtatutes, clear and expreſs in themſelves; arguments drawn from analogy may ſometimes illuſtrate, but never prove any thing.

Nor do I think it matters much, whether theſe ſtatutes, made certainly *in pari materia*, be conſidered as one code, or even as different clauſes of one law; or be taken ſeparately; they explain each other, it is true, but each clauſe may be conſidered *ſecundam ſubjectam materiam*. And although a good deal has been ſaid, to ſhew that this ejectment was brought (as it manifeſtly was) under the ſtat. of the 4 of G. c. 5.

Kenmare *againſt* leſſee of Supple, in error.

yet when 11 *An.* c. 2. the firſt upon the ſubject, is looked into, it will be found in the part referred to, to bear the ſame conſtruction as the ſubſequent ſtat. 4 G

The preamble of the 11 of *Anne* is for ſecuring to leſſors and landlords their juſt rights, that is, their reſerved rents; and to prevent frauds frequently committed by tenants, and inconveniencies happening to landlords; the conſtruction, therefore, which muſt be adopted, is ſuch as will beſt ſecure thoſe rights, and prevent the frauds and inconveniencies complained of; to go further in favour of landlords would be oppreſſion, and to encourage forfeitures by a proceſs calculated to inforce the payment of rent only; on the other hand, to ſtop ſhort of theſe objects would be to render remedial laws uſeleſs and nugatory.

To ſhew, however, that the 11 *An.* is not the ſtatute which immediately governs the ejectment brought by Lord *Kenmare* in 1774, or the evidence given by *Supple* to defeat that ejectment; it is only neceſſary to turn to the 2d ſect. of 11 *An.* which preſcribes the eſſential ingredients for an affidavit in caſe of judgment by default. It ſhould ſhew that more than a half-year's rent was due, that there was no ſufficient diſtreſs, and that the landlord had a power of re-entry at the time of the ejectment brought. Now the affidavit made in this caſe by *Ellen Galway* to aſcertain the rent is ſilent as to the two laſt particulars, diſtreſs and power of re-entry; and follows the mode preſcribed by 4 *G.* which confines the affidavit to the ſingle point, of more than one year's rent being due at the time of ſerving the ſummons in ejectment.

The

The copulative *and*, relied on by ſome of the counſel for Lord *Kenmare*, which is in the 2 ſect. of 11 *Ann.*; and the disjunctive *or*, equally relied on by ſome of Mr. *Supple*'s counſel; where this word appears in the 3d ſect. of 4 *G.* will, in my apprehenſion, not vary the caſe for or againſt the tenant. I underſtand 11 *Ann.* with Mr. *O'Neil*, of counſel for Lord *Kenmare* thus, "If the tenant ſuffer judgment and execution, "*without paying the rent in arrear, and full coſts*, "*and* without filing any bill within ſix calen- "dar months after execution," then the tenant ſhall be "barred and foreclоſed." But if he do either, he ſhall not be barred or foreclоſed: ſo it is in 4 *G* ſect. 3. "If the tenant in like "manner ſuffer judgment and execution, with- "out paying on demand the rent aſcertained to "be in arrear, together with full coſts, *or* de- "poſiting the ſame in a court of equity on filing "a bill within ſix months, then he ſhall be "barred and foreclоſed," as in the former ſtatute: but if he do either, he, as by the former ſtat. ſhall not be barred. So that one ſtatute is not on account of the copulative leſs favourable to the tenant, than the other on account of the disjunctive? but why vary the expreſſion? becauſe it was not neceſſary to depoſit the rent, &c. in a court of equity until 4 *G.* and the alternative of paying the rent to the landlord on demand, *or* depoſiting it in a court of equity, is given by the 4 *G.* By each law, both omiſſions, viz. want of payment and want of filing a bill are neceſſary to *bar* the tenant *at law* and *foreclоſe* him *in equity*.

Kenmare *againſt* leſſee of Supple, in error.

Here I come to the omiſſions by the tenant, in which both acts, viz. 11 *Ann.* and 4 *G.* ſpeak the ſame clear preciſe language, which is fatal

to

Kenmare *againſt* leſſee of Supple, in error.

to the defendant's title, and upon which I ground my opinion in this caſe. The tenant is *to pay the rent aſcertained to be in arrear, together with full coſts.* He has not done ſo here, nor has he even *tendered* what the law requires he ſhould *pay*; for ſuppoſing for a moment that a *tender* ſhould be equal to a *payment*, all that the record ſays he proved, was, a tender of the rent aſcertained due, with the coſts of the judgment and ejectment, which is, in my opinion, very far from what the acts mean by full coſts, an expreſſion which ſeems to go more to compenſation.

But it is contended that *tender* is equal to *payment*, and that has been conſtantly affirmed by Mr. *Supple*'s counſel. In this caſe I hold it, under theſe acts, to be otherwiſe.

In 4 *G.* the act under which Lord *Kenmare*'s ejectment was manifeſtly brought, and on which defendant's counſel have ſo much relied, there is not a word of *tender*; but in 11 *Ann.* where the word *tender* is made uſe of, it is obſervable, that it is *before trial*, but after judgment and execution not a word of tender; and there are many ſubſtantial reaſons for this. In caſe of a tender before trial, the proceedings ſhall ſtop; but after judgment and execution, another remedy well known in the law, which ariſes from the joint act of the parties, and which, when performed, is a bar of all actions, is wiſely taken up by the legiſlature, which is accord with ſatisfaction; where, by the payment of the tenant and the acceptance of the landlord, the landlord has a right to diſpenſe with the law made in his favour, by accepting the rent, to enforce the payment of which the act of parliament was paſſed.

And

And this anſwers a ſerious objection, which is urged in favour of remainder men, as between a remainder-man and tenant for life; for it is ſaid, and ſaid truly, by Mr. *Wolfe*, that acceptance of rent, if the leaſe be actually avoided, would not bind the remainder-man. The anſwer to which ſeems to be this, that the act ſays, payment within ſix months ſhall prevent the leaſe from being affected. But, as acceptance is neceſſary to ſhew an acquieſcence and ſatisfaction on behalf of the leſſor, ſo nothing ſhort of actual payment at law, or depoſiting the rent in a court of equity, will be ſufficient to keep the tenant's title in exiſtence. Kenmare *againſt* leſſee of Supple, in error.

I agree with Mr. *Emmet*, that the judgment is by ſtatute, and as it were *ſub modo*; the legal as well as equitable conſequences of the judgment and execution are ſuſpended for ſix months; and by payment and acceptance, the judgment ſeems vacated by conſent. But this reaſoning does not go to tender and refuſal: if the operation which the act gives to payment were to be extended to the tender, as ſet out in the record, it would eſtabliſh this alarming poſition, that a tenant, againſt whom a judgment had been had upon an ejectment for non payment of rent, and an *habere* executed thereon, by which he had been actually removed from the poſſeſſion, may, after an acquieſcence, at any time within twenty years, be able to maintain an ejectment againſt his landlord to get back the poſſeſſion, after the face of things ſhould be entirely changed, and the lands had gotten into other hands: and this, only by giving parol evidence, that the tenant had made a tender of the rent and coſts to an agent, or receiver, within ſix months after he (the tenant) had been removed.

Kenmare *againſt* leſſee of Supple, in error.

moved. If ſuch a conſtruction were yielded to, it would not only encourage frauds againſt landlords, but increaſe their inconveniencies, and tend to deprive them of their rights in the teeth of all theſe laws made for their ſecurity. It would make landlords the miſerable ſlaves of tenants, and of the worſt of them.

The other point made is,—That the judgment was irregular and a nullity, and that therefore nothing ſtood in Mr. *Supple*'s way. I ſhall, with a few obſervations upon the part of the act the 4 *G.* which relates to the aſcertaining the rent, reſt upon the authority of leſſee of *Hitching*'s v. *Lewis*, 1 *Burr.* 620, cited by Mr. *Dickſon*. That was, as this is, upon an ejectment brought by a tenant againſt his landlord, who had formerly obtained a judgment by default in a former ejectment brought by him againſt this ſame tenant. And the point, upon a ſpecial caſe made for the Court of King's Bench was, whether it was neceſſary for the landlord, who was defendant, and ſtood exactly as Lord *Kenmare* here does, to produce an affidavit that half a year's rent was due, and that the leſſor of the plaintiff in ejectment had power to re-enter. Lord *Mansfield* and the court were ſo clear, that they would not hear the defendant the leſſor's counſel argue it. Now there, there was no affidavit whatſoever, yet the court preſumed it right, as it was ſtated to be within the act of parliament; but here I ſee no defect in the affidavit which is ſet forth, it ſtates and aſcertains the rent as preſcribed by 4 *G.* 1. It is ſaid that it was taken before a commiſſioner, ſo is the univerſal practice of the King's Bench here, and a very convenient practice it is; but it is ſaid to be againſt the act—that I do not ſee. The 4 *G.*

G. c. 5. ſect. 3. ſays only, "The judge, before whom ſuch judgment ſhall be given, ſhall aſcertain the ſum ſo due and in arrear," that does not ſay it ſhall be by affidavit made before him. It may by affidavit made before a commiſſioner, and if this objection were to ſhake judgments in ejectment by default, it would ſet afloat a great part of the property of this kingdom. Kenmare *againſt* leſſee of Supple, in error.

Leſſee of *Graham* v. *Pleydel*, in the exchequer in 1770, has been cited, to ſhew the judgment here a bad one. I was in that cauſe, and I obſerve by a note I have, that two iſſues were directed by Lord *Tracton*; 1ſt. Whether an ejectment brought in 1757 by the defendant the leſſor, for non-payment of rent, was brought to defeat a leaſe of 1755, under which plaintiff claimed. The jury found that it was not.

The 2d iſſue was, whether the rent for which the ejectment was brought was aſcertained by the judge, or court, by or before whom the judgment on that ejectment was given. They find it was *not*. The deputy clerk of the pleas ſide in the Exchequer, was examined in *Graham* v. *Pleydel*; he ſaid, that he had been forty years in the office, and that at the time of iſſuing *haberes* his predeceſſor, and he ſince him, had been uſed to iſſue *haberes* without entering any rule to aſcertain the rent when the affidavit was filed in the vacation; but that at the time he was examined, ſuch an order was entered as of the preceding term, *without any direction of the judge* for that purpoſe. This is the only caſe cited to ſupport the objection; but be the judgment what it may, in the ejectment here brought in 1774, there it ſtands, and execution iſſued upon it, and is ſtill in the way.

I would

Kenmare *againſt* leſſee of Supple, in error.

I would not be underſtood to give any opinion, that wherever there was a judgment in ejectment the tenant muſt file a bill to get rid of it, notwithſtanding actual payment and acceptance by the landlord within ſix months after execution. I do not think it neceſſary, for the purpoſe of determining the preſent caſe, to give any opinion upon that point: but as at preſent adviſed, I think it would be a miſchievous conſtruction to give thoſe laws in caſes between tenant for life and remainder-man. It would be dreadful, that acceptance of rent, and the being reſtored to the poſſeſſion after executing the *habere*, ſhould not continue the tenant's title and make it compleat; I believe the univerſal practice has been, never to come into a court of equity but when the rent and coſts were to be depoſited, and I believe it is not the practice of courts of equity to make any decree upon ſuch bills, and never that a new leaſe ſhould be made. I underſtand the acts to mean, that the avoidance ſhall be conſummate if payment be not made or a bill be not filed in ſix months after execution; and where the ſtatute ſays, *from thence diſcharged*, to mean, the lands ſhall be charged or bound by the leaſe, unleſs the tenant neglect to make payment, or to file his bill and depoſit the rent. The words *barred* ſeems to me to refer to law, and *foreclоſed* to equity. It is no objection to ſay, that, when once a judgment in ejectment has been had, and execution executed thereon, the title muſt be reveſted by matter of equal ſolemnity; if that were true, half the leaſes in the kingdom, where tenants have been let back, would be void. I take the full anſwer to be, that where a new remedy is given by the ſtatute to recover

rent

rent and evict for that purpoſe, a new remedy of reveſting is equally juſt and proper, and that the exiſtence continued by payment, or by a court of equity, ſhews to a demonſtration that no new title, or grant, or decree, is neceſſary. Kenmare *againſt* leſſee of Supple, in error.

I have taken up more time than the difficulty of the caſe required, but the importance of the queſtion, and the ability with which it was argued may be ſome excuſe.

In my opinion, the judgment ought to be reverſed. I think the plaintiff below ſhould have been non-ſuited, or that judgment ſhould have been for the defendant, and that the bill of exceptions is well founded.

Lord *Chancellor*.—The 1ſt queſtion is, whether a judgment by default in ejectment, on which the rent was aſcertained by affidavit, is a good judgment, and deprives the tenant of a right of entry. The caſe cited by my Lord *Earlsfort* is exactly in point, and ſo like the preſent, that one could ſcarcely have expected it. I have always thought that a judgment, though by default, is good till reverſed by writ of error. Stat. 4 *G.* c. 5. ſ. 3. ſays, "in caſe of judgment "againſt the caſual ejector, if it ſhall be made "to appear to the court that more than one "year's rent was due before the ſummons; "then in ſuch caſe, ſuch landlord or leſſor, or "his leſſee in ejectment, ſhall recover judg-"ment and have execution thereon." I have therefore always been of opinion that ſuch a judgment was good, and that the tenant could not bring an ejectment while the other judgment ſtood in force againſt him. If it had not been regularly obtained, it ſhould be reverſed by writ of error.

As

Kenmare *againſt* leſſee of Supple, in error.

As to the 2d queſtion, whether the *tender* is equal to the *payment* of the rent and coſts within ſix months, and therefore leaves a right of entry in the tenant, on which he may afterwards maintain an ejectment?

I think the *tender* of the money is not ſufficient, though it had been made to the landlord himſelf, inſtead of his agent, and for theſe reaſons. The 11 *Ann.* c. 2. ſ. 2. ſays, "In caſe "the leſſee ſhall permit judgment to be had "and recovered on ſuch ejectment, and execu- "tion to be thereon executed, without *paying* "the arrent arrear with *full* coſts." So that the rent muſt be actually *paid*, which cannot be unleſs the landlord accept of it. Next comes the 4 *G.* c. 5. ſ. 2. which was meant to relieve the landlord from the difficulty of proving that a ſufficient diſtreſs was not on the ground, and other inconveniencies that might have ariſen from 11 *Ann.*; as if another gale of rent had become due after the ſervice of the ſummons in ejectment, and many others. This ſtatute enacts, that "If defendant ſhall permit judg- "ment to be had, and execution to be executed "thereon, and ſhall not on demand *pay* the "rent in arrear together with *full coſts*." Both theſe ſtatutes ſay the *full coſts* muſt be paid. The ſtatute means to give a compenſation to the landlord, and to repay him the *whole of the expence* he had been put to in recovering his rent; the tenant did not tender the *coſts out of pocket* to the agent, but only the *common coſts* of the ejectment; that certainly was not the intent of the legiſlature. But if the *tender* ſhould be equivalent to the *actual payment*, a great inconvenience would ariſe to the landlord. The defendant, after judgment and execution, might

might come to the landlord and ſay, here are your rent and coſts, take them, or refuſe them at your peril; if you refuſe them, the *benefit* ariſes to me from having *tendered* them, as much as if you had *accepted* the money. The landlord does not know the amount of the coſts; and if he wait till he can be informed thereof, he is to loſe the benefit of his execution, and the tenant may bring his ejectment eight or nine years afterwards. This is the ſtrange ſituation the landlord would be in. But, by the proviſion in 4 *G.* that is cured beyond diſpute; it ſays, the tenant muſt *pay on demand.* If the landlord demand the rent the difficulty is removed; for it muſt be ſuppoſed the landlord would not make the demand until he ſhould know the amount of the coſts he is entitled to. The firſt ejectment in 1774 was brought by Lord *Kenmare* on 4 *G.* and alſo on the 5 *G.* 2. c. 4. ſ. 1. which gives the landlord a right to bring his ejectment when there is no clauſe of re-entry in the leaſe, in the ſame manner as if there had been. Suppoſe there had been a clauſe of re-entry, and the plaintiff had entered, before that ſtatute, the tenant could have had no relief but in equity. The 11 *Ann.* c. 2. ſays, if the tenant file his bill within the limited time, and bring the rent and coſts into court, the landlord ſhall be reſtrained *from proceeding at law*; but does that ſay the tenant ſhall *recover the land?* by no means. The cauſe muſt go on to be heard, and a court of equity will make ſuch decree as in good conſcience ſhall ſeem proper. The court will make compenſation to the landlord for his trouble and the delay he has ſuſtained.

Kenmare *againſt* leſſee of Supple, in error.

Then it is ſaid, the landlord will always have it in his power to deprive the tenant of the benefit

Kenmare *againſt* leſſee of Supple, in error.

nefit of the proviſion in the act, which enables him to redeem his land within ſix months after judgment, by refuſing to receive the money offered to him, though it be the full amount of his rent, arrear, and coſts: to this there is a very plain anſwer. The ſtatute gives the tenant the power of filing a bill in equity within the ſame time, on his paying the rent and full coſts into court, which will have the ſame effect.

But if the *tender* could have had any effect in giving the tenant a right of entry, I think it is deſtroyed in equity by the ſubſequent lying by for nine years. The ſtatute directs an application to a court of equity; but a court of equity would oblige the tenant to make compenſation to the landlord; or would ſay, your right of entry no longer remains. If it would not be agreeable to the conſcience of a court of equity, ſhall a court of law againſt conſcience give relief? a court of law exerciſes its diſcretion in an equitable manner, and will not give relief againſt reaſon and conſcience. The defendant in error ſhould, upon the refuſal of the agent to receive the money, have reſorted to a court of equity by bill for remedy; and the court would have decreed him to hold for the remainder of his term upon making full compenſation. But by lying by ſo long, I think he could not now have any claim to the interference even of a court of equity.

I am, for theſe reaſons, of opinion, that the bill of exceptions was well founded, and that the judgment muſt be reverſed.

JUDGMENT REVERSED.

In Chancery.

MICHAEL AYLMER, Eſq; againſt Sir PATRICK BELLEW, Bart. and Dame MARY his Wife, MALACHY DONNELLAN, and WILLIAM BURKE, Eſqrs.

Aylmer *againſt* Bellew.

PREVIOUS to the marriage of the plaintiff with *Honor Hore*, articles were executed dated 7th *June*, 1765, wherein ſhe covenanted with truſtees, for her, her heirs, executors and adminiſtrators, to pay or cauſe to be paid, within ſix months from the date, the ſum of 8000*l.* as part of her marriage portion; and it was agreed that the ſame ſhould be applied in diſcharge of the mortgages in the firſt place, and next in procuring aſſignments of the judgments in a ſchedule annexed, affecting the plaintiff's eſtate. Theſe aſſignments it was declared ſhould be in truſt for the heir male of the marriage; but if there ſhould be iſſue female only, for the daughters; but if no iſſue, for the plaintiff, his executors, *&c.* On the part of the plaintiff it was covenanted, That he would aſſign to the truſtees certain ſums of money to which he was intitled, not exceeding 8000*l.* that, immediately after ſaid 8000*l.* ſhould be raiſed by ſaid *Honor*, or ſaid ſums ſhould be paid in, he would procure re-conveyances of charges

A papiſt, ſeized in fee, previous to her marriage with the plaintiff, (a papiſt) in conſideration thereof, and of his covenanting to make up her dower 800*l. per ann.* and provide for younger children, covenants for her and her heirs, to pay 8000*l.* as her marriage portion, to be applied in procuring aſſignments of charges on his eſtate, in truſt, for the heir male of the marriage, but if no iſſue male, then for the daughters; if no iſſue, for the plaintiff. 4000*l.* is paid, the marriage takes place, and the wife dies without iſſue;

whereupon her lands come to her ſiſters, her heirs at law; againſt whom, plaintiff files his bill, to recover the reſidue of the ſum of 8000*l.* He is intitled to recover, in reſpect of the lands come to the heirs, for they are real aſſets: and there is nothing in the popery laws (2 *Ann.* c. 6. & 8 *Ann.* c. 3.) which prevents a papiſt from binding his heirs, to a papiſt, for a fair debt, or a fair and valuable conſideration; or at all alters the law with reſpect to lands deſcending being real aſſets in the hands of the heir.

affecting

Aylmer *againſt* Bellew.

affecting his eſtate, and remove all legal obſtructions to her dower, and particularly to make it up 800*l.* a year, and alſo to make proviſion for younger children.

The plaintiff and *Honor Hore*, were both papiſts. The ſum of 4000*l.* part of that ſtipulated to be paid by her, was paid immediately upon the execution of the articles. About three months after the ſolemnization of the marriage, Mrs. *Aylmer* died without iſſue, leaving the covenant unperformed, and without any perſonal aſſets; upon her death a conſiderable real eſtate of which ſhe had been ſeized in fee, came to her ſiſters and heirs at law, Lady *Bellew* and Mrs. *Donnellan*, both papiſts; Lady *Bellew*'s moiety was aliened before the commencement of this ſuit. Mrs. *Donnellan* is dead, and her moiety remains in the ſeiſin and poſſeſſion of Mr. *Donnellan* the defendant, her ſon and heir at law.

This bill was filed 22d *March* 1785, to have the ſum of 4000*l.* with intereſt from ſix months after the date of the articles, decreed a charge againſt the coheirs of Mrs. *Aylmer*, and for a ſale of the lands deſcended to them, in default of payment.

W. Burke is the ſurviving truſtee in the articles. The plaintiff in his bill inſiſts, that if by the laws in force againſt popery, at the time of the execution of the articles, he was diſqualified from ſuing; ſuch diſqualification is now removed by the late relaxing laws.

On 18th *July* 1786, the Lord Chancellor delivered his opinion.

Lord *Chancellor*.—This bill is brought for an account of real aſſets, and for payment of what remains

Aylmer *againſt* Bellew.

remains due to the plaintiff, upon the foot of a covenant in articles in the nature of marriage articles, entered into upon the marriage of *Honor Hore* with the plaintiff. Both the parties were papiſts. The articles were executed in *June* 1765. The plaintiff covenanted to aſſign to truſtees certain ſums of money to pay off incumbrances affecting his eſtate, that ſhe might have a clear eſtate to come upon for her dower, and ſhe covenanted for herſelf and her heirs, to raiſe 8000*l.* for certain uſes. Mrs. *Aylmer* died about three months after the marriage, leaving the covenant unperformed; but 4000*l.* of the ſum had been paid according to the covenant. Upon her death the eſtate came to her heirs, Lady *Bellew* and Mrs. *Donnellan*, who were papiſts. Mrs. *Donnellan* is ſince dead, but her ſon and heir is now of age, and before the Court.

Mr. *Aylmer* is a creditor of his late wife, under this covenant; and Mrs. *Aylmer* being dead, without payment, he claims this from the defendants *Bellew* and *Donnellan*, in reſpect of real aſſets come to them by deſcent, as her heirs. There is no queſtion as to the covenant, and the heirs being bound by it, when they have real aſſets by deſcent; nor as to the ſufficiency of the aſſets: but to this claim ſeveral objections have been made.

Firſt, That it is a caſe properly determinable at law; that if the covenant is good to bind the defendants, the heirs of Mrs. *Aylmer*, an action at law ought to have been brought upon it, and not a bill in equity.

The ſecond is, That the eſtates have not *deſcended* to them, but come to them as gavellers, under the ſtatute 2 *Anni*. That they take

Aylmer *againſt* Bellew.

as parliamentary purchaſers, and at law, might have pleaded *riens per diſcent.*

The third is, That nothing can be aſſets in equity, which would not be ſo at law, but theſe eſtates are not aſſets at law.

The fourth is, That this deed of covenant, to give it effect, ought to have been enrolled within ſix months after the making; that it was not, and therefore is a nullity.

The fifth is, That this is a covenant made by a papiſt to a papiſt, which is to affect land; that this is a kind of a pledge of land to a papiſt, and if a pledge of land to a papiſt would be good, a mortgage would be ſo too; but that being to ariſe out of a real eſtate, it cannot be taken by a papiſt, any more than a real eſtate itſelf could.

This caſe ſimply conſidered is a proceeding againſt the heirs of Mrs. *Aylmer*, upon a covenant, in which ſhe bound herſelf and her heirs, upon the ground of their having real aſſets deſcended to them from her.

It is clear, that at law where the anceſtor by any deed, obligation or covenant, binds himſelf and his heirs to pay a ſum of money, the debt deſcends upon the heir at any rate, but he is not bound to pay it till he has aſſets by deſcent. As Mr. Juſtice *Blackſtone* ſays, he is bound ſo far forth only as he has aſſets by deſcent: till he has aſſets the covenant lies dormant. So in the caſe put by him of a covenant, by a man for himſelf and his heirs to keep a houſe in repair; the heir can then only be compelled to perform the covenant, when he has an eſtate ſufficient for this purpoſe, by deſcent from the covenantor. But ſtill the obligation deſcends and becomes the debt of the heir. To this purpoſe is what Lord

Aylmer *againſt* Bellew.

Lord *Hardwicke* ſays, in and in *Stileman* v. *Aſhdown*, 2 *Atk.* 609. "A bond creditor," ſays he, "may have an action of debt againſt the heir and judgment againſt him, upon aſſets deſcended: for it is the debt of the heir, and the action is in the *debet & detinet*: and the heir can diſcharge himſelf no otherwiſe than by pleading *riens per diſcent*"

By 4 *Ann.* ch. 5. ſ. 4. "Where the heir has aliened before action brought, he ſhall be liable to the value of the land, as if the ſame were his own proper debt or debts. But the lands aliened ſhall not be charged." In the preſent caſe, the moiety deſcended to Lady *Bellew* has been aliened before the commencement of the ſuit; and in ſuch caſe the ſtatute ſays, execution ſhall be taken out againſt the heir to the value of the land, as if the debt were his own proper debt. And by ſ. 5 "if judgment be given againſt the heir by confeſſion of the action, without confeſſing the aſſets, or upon demurrer or *nihil dicit*, execution ſhall be for the debt and damages, without any writ to inquire of the lands deſcended."

I conſider this caſe, firſt, as if neither the plaintiff nor his wife had been papiſts, ſecondly, as they were papiſts.

In the caſe of a proteſtant creditor, no doubt, an action in the *debet* and *detinet* would lie againſt the defendants, in reſpect of real aſſets deſcended, and execution would go againſt Lady *Bellew* for the value of the land as if it had been her own debt. Then the only queſtion is, can the plaintiff, being a papiſt, come here to have ſatisfaction from the defendant, to the value of the land deſcended? Here I may conſider the objections,

Aylmer *againſt* Bellew.

The firſt is, That it is a queſtion determinable at law. As this objection has been waved by Mr. Attorney General on the part of the defendants, and the parties are deſirous of having the opinion of this court, whether this covenant is good or not; and as I am willing to bring litigation to an end as ſoon as may be, I give into this conſent of the parties. This court has been liberal, and let itſelf looſe in order to accelerate the payment of creditors, as is ſaid in *Stileman* v. *Aſhdown* and in other caſes. Therefore I go to the other objections, obſerving only this, that this is the caſe of a truſt, and that Mr. *Aylmer* comes againſt ſome of the heirs for a ſatisfaction out of the money ariſing from the ſale of part of the lands deſcended.

The ſecond objection is, that no real aſſets have deſcended: that Mrs. *A.*'s ſiſters took as parliamentary purchaſers, under 2 *Ann.* c. 6. ſ. 10. As to this I am clear, that the eſtate has deſcended, and that they could not have pleaded at law, *riens per diſcent.*

The eſtate either gavelled, or it did not. If it did not gavel, it *deſcended* to the ſiſters as coheireſſes, and was real aſſets. If it did gavel, yet ſtill the heirs ſhall take by deſcent, and the lands will ſtill be real aſſets. The words of the act are, "All lands, tenements, &c. where-"of any papiſt now is, or hereafter ſhall be, "ſeized in fee-ſimple or fee-tail, ſhall from "henceforth, ſo long as any papiſt ſhall be "ſeized thereof in fee-ſimple or fee-tail, be of the "nature of gavelkind, and if not ſold, &c. for "good and valuable conſideration, &c. ſhall "for ſuch eſtate from ſuch papiſt *deſcend to* "*and be inherited* by all and every the ſons of "ſuch papiſt, any way *inheritable* to ſuch eſtate, ſhare

Aylmer *againſt* Bellew.

" ſhare and ſhare alike, and not *deſcend* on or " come to the eldeſt of ſuch ſons *only* being a " papiſt, as heir at law; and ſhall in like man- " ner from ſuch reſpective ſons, being papiſt, " *deſcend to* and be *inherited* by all and every " the ſons of ſuch ſons, ſhare and ſhare alike, " &c." The act is expreſs that it ſhall deſcend. What ſays the common law? 1 *Inſ.* 376. *b.* " If a man be ſeized of lands in ga- " velkind, and have iſſue three ſons, and by " obligation bindeth himſelf and his heirs, " and dieth: an action of debt ſhall be main- " tainable againſt all the three ſons: for the " heir is not chargeable unleſs he hath lands by " deſcent." This is the very caſe here. The ſame doctrine is to be met with in *Glanvil.* lib. 7. c. 3. and in *Dalton*'s Office of Sheriff, 126. " In gavelkind all the ſons are liable to the " debts of the father, in reſpect of the lands " which they *inherit* from him." So both by the act and by the common law, the lands *deſcend*, and as gavelkind lands, are aſſets in the hands of the heir.

The third objection is grounded on the ſecond; but that being removed, this does not apply.

The fourth objection is, That theſe articles ought to have been enrolled within ſix months after the making. This objection is grounded on 2 *Ann.* c. 6. ſ. 14. but, I think, is not warranted by it. The words are, " All debts and " incumbrances that ſhall or may *charge or in-* " *cumber any real eſtate* of any papiſt, ſhall within " ſix months, next after the making thereof, be " inrolled, &c." And in default of ſuch inrolment of ſuch *incumbrance*, the ſame ſhall not charge the lands of any papiſt, when and during ſuch time

Aylmer *againſt* Bellew.

time as they ſhall belong to a *proteſtant.*" The act only applies to the caſe where the lands are in the hands of a proteſtant. That is not the caſe here. And in my opinion, this covenant is not any charge or incumbrance on the land. Here it is clearly not; for part of the land has been aliened before the commencement of the ſuit, and cannot be charged in the hands of the alienee. Therefore for both theſe reaſons, this objection does not apply.

I now proceed to the fifth objection, on which the greateſt ſtreſs was laid. It is, that Mr. *Aylmer*, being a papiſt, could not take by this covenant, as it was meant to ſecure ſomething out of the profits of land: nor could Mrs. *Aylmer*, for the like reaſon, bind her heirs by this covenant. As to this, I ſee nothing in the popery laws, which prevents a papiſt from entering into a bond, or covenant with another papiſt, or any other perſon, and from binding his heirs, for a fair debt, or for a fair and valuable conſideration. It is very different from a bond or covenant, entered into to ſecure a beneficial intereſt to a papiſt, where no conſideration was given. Nor do I ſee any thing in them, that at all alters the law with reſpect to land deſcending, being real aſſets in the hands of the heir.

The popery laws in England, and thoſe in Ireland are very different. In England, papiſts are diſabled to take by deſcent in any manner, by 11 & 12 *W.* 3. This will account for many things that have been ſaid, aukwardly enough in the books, on this ſubject.

It is ſaid, that by ſuch a covenant, if it ſhould be adjudged a good one, a papiſt might take a profit out of lands, contrary to 2 & 8 *Ann.*

By

Aylmer *againſt* Bellew.

By 2. *Ann.* c. 6. papiſts are diſabled "*to pur-* "*chaſe or to buy* manors, lands, &c. or any "rents or profits out of the ſame, or any leaſes "or terms thereof, other than terms of years "not exceeding thirty-one years. And it is "enacted, that all and ſingular eſtates, terms "or any other profits whatſoever, other than "ſuch leaſes, ſhall be void."

Lands are acquired two ways; by deſcent or by purchaſe. The firſt is by right of blood, and act of law. The ſecond is by one's own act; and in its moſt comprehenſive ſignification, the word *purchaſe* includes every other mode of coming to an eſtate, but that by inheritance. In its more confined ſenſe, it means ſuch acquiſitions as are made by bargain and ſale, for valuable conſideration.

The word, in its comprehenſive ſignification, includes theſe five methods of acquiring eſtates, viz. Eſcheat, Occupancy, Preſcription, Forfeiture, and Alienation: and theſe only. As to acquiſition by execution, which Lord *Coke* conſiders under the head of *elegit*; it is not conſidered by any writer, as an acquiſition by purchaſe. The acquiring profits out of real aſſets, is not an acquiſition by purchaſe: it is only a right to be paid by the heir, out of the aſſets in his hands.

I do not know that this ſection has ever been conſidered to extend to purchaſers, but, in the more confined ſenſe, for valuable conſideration.

It has not been *adjudged*, that a papiſt cannot take by mortgage, ſtatute ſtaple, ſtatute merchant, or by *elegit*. It has only been *ſaid*, and that argumentatively, and chiefly in England, where the ſtatutes againſt popery are much ſtronger than here.

If

Aylmer *againſt* Bellew.

If this were a new queſtion, I make no doubt but that the purchaſing mentioned in the ſtatute would be conſidered to mean purchaſes for money. Does this ſection prevent a papiſt from charging his land for the payment of his juſt debts? by no means. Neither does it prevent him from taking, or making a covenant binding the heirs; but it does not allow a papiſt to *buy* land. Nor does he in this caſe, he takes only a ſecurity to be paid his money.

In this caſe, part of the lands has been ſold before action brought The lands are not charged or incumbered. If they were, the charge would fall on purchaſers, which cannot be. Nothing remains but the money in the hands of the heir; in like manner as in the hands of an executor.

The caſes of warranty went much farther. In ſome caſes the heirs were bound without aſſets even by collateral warranty. So at preſent they are *bound*, it is their debt; but they can be charged only in reſpect to aſſets deſcended.

Section 14. Of this act comes next. This I have conſidered before "All debts and in-"cumbrances, &c. ſhall within ſix months be "enrolled, &c." but not unleſs they affect the land. This covenant clearly does not as to one moiety, and as to the other it is not in the hands of a proteſtant. There is nothing elſe in this act of *Anne* that can at all affect this queſtion.

As to 8 *Ann.* c. 3. The firſt ſection enacts, "That no papiſt ſhall take any annuity for life "or years, and that all ſecurities for ſuch ſhall "be void, except, &c." This reſpects only annuities and ſecurities for ſuch. But this is no

ſecurity

ſecurity for an annuity, it is only a covenant for the payment of money: ſo this ſection does not apply. Aylmer *againſt* Bellew.

Section 27. makes void all collateral ſecurities to cover any ſale contrary to 2 *Ann.* c. 6. This too gives the diſcovery of lands ſo purchaſed, and ſecurities to cover and ſupport a purchaſe. But this is not a collateral ſecurity to ſupport or to cover any purchaſe. *Reed* v. *Aylmer*, *Howard*'s *Popery caſes*, 80. has been cited. It is a very ſtrange and imperfect note, and it is very hard to make any thing of it; it ſays the plaintiff was decreed to the benefit of a ſtatute ſtaple, not extended on the lands, upon the principle of its being a collateral ſecurity; if ſo, it was a very proper decree, and could not have been reverſed. Lord *Hardwicke*, and Lord *Carteret*, are the only lords mentioned to have ſpoken, and they are made to ſay that the plaintiff came too ſoon, before the lands were extended. I am certain Lord *Hardwicke* did not ſay what is there aſcribed to him, for he always ſpoke of it as a very doubtful point, whether a papiſt could extend lands by *elegit*, &c. as it had never been determined At leaſt if he did ſay ſo, it muſt have been upon the Engliſh popery laws. Lord *Carteret* was a very ſenſible man, but no lawyer, ſo his opinion, on this point, can have no weight. Upon the whole, from what appears in that very imperfect note, I muſt take it to have been an original ſecurity; conſidering it as ſuch, I ſee nothing in the popery laws to affect it. If it had been a collateral one there would. But that caſe does not at all apply here. This is not the caſe of one who has extended lands on a ſtatute ſtaple, ſtatute merchant, or *elegit*; nor ſhould I, were it neceſſary to decide that point, conſider

ſuch

Aylmer *againſt* Bellew.

ſuch a one a purchaſer. Thoſe executions have never been included, by any writer, amongſt purchaſes. This covenant does not bind the lands; it merely binds the heir, in reſpect of aſſets.

There can be no ſhadow of difficulty, as to Lady *Bellew*'s part, for that was aliened before the commencement of the ſuit. The only difficulty is, where the lands remain in the hands of the heir; what kind of ſatisfaction is the party intitled to at law? what ſort of execution ſhall the obligee have?

According to Mr. *Dalton* (who wrote with as much learning as any author on the ſubject) there are ſeven ſorts of execution. Firſt, upon a *ſtatute merchant*. Second, on a *ſtatute ſtaple* (in theſe two it is againſt the body, lands and goods: the creditor holds the lands till he is ſatisfied; his intereſt in them is only a chattel.) Third, upon a *recognizance* againſt body, lands and goods. Fourth, an *elegit*, againſt lands and goods; here too the creditor holds the lands till ſatisfied, but in the third ſort, the ſheriff muſt levy. Fifth, a *capias ad ſatisfaciendum*, againſt the body only. Sixth a *fieri facias*, againſt the goods only. Seventh, a *levari*, againſt the profits of the land; and this is the old common law execution. There are no other ſorts of execution than theſe ſeven.

In this caſe the creditor could only have a *levari*. *Dalton* ſays, that in this execution the ſheriff is to receive the rents and profits, and to deliver them to the creditor: if ſo, how is the land itſelf charged? if it be ſold the ſecurity is gone, but if it remain, the creditor only gets the profits. In *Plowden*, 441. the execution is in this manner, but it is not ſaid there, whether

ther the delivery was to be of the land itſelf, or not. I think it might have been of the land itſelf, if the heir had confeſſed the aſſets. I doubt whether it was done in more than one caſe, and then the judges made a great difficulty about inſerting the clauſe, to take the land in execution. But ſuppoſe it might be done, yet it could be done no longer than the law would admit it; and if then the law had ſaid, a perſon of a particular deſcription ſhould not be capable of holding land, the judges could not have inſerted ſuch a clauſe, but would have given a *levari facias*. Apply that to the preſent caſe: ſuppoſe inſtead of a bill, plaintiff had brought an action, and having obtained judgment was ſuing out execution; if I were on the bench and entertained any doubt whether a papiſt could take the land in execution, leſt it might be conſidered as a purchaſe (for in that light only the doubt could ariſe, though I do not think it would) I would order execution to iſſue as the old common law execution in *Plowden*; and the ſheriff ſhould levy the debt out of the profits of the land. The law then would not prevent execution, even though it could be conſidered as a purchaſe; which I do not think it could. There the plaintiff would have the rents and profits; which brings it to the caſe of a ſtatute merchant, ſtatute ſtaple, or *elegit*; and there courts of equity let themſelves looſe to accelerate the remedy, and inſtead of the rents and profits give ſatisfaction by a ſale.

Aylmer *againſt* Bellew.

On theſe principles, and on theſe grounds, I think Mr. *Aylmer* is intitled to have ſatisfaction againſt the heirs of his wife, for the 4000*l.* remaining unpaid.

Accordingly

Aylmer *againſt* Bellew,

Accordingly his Lordſhip decreed the ſaid ſum of 4000*l.* to be paid to the plaintiff in three months, with intereſt from the time of filing the bill. One moiety thereof by Sir *Patrick Bellew* and *Mary* his wife, in reſpect of real aſſets deſcended to her from ſaid *Honor*, and aliened before the filing of the bill. The other moiety by the defendant *M. Donnellan*, as ſtanding in the place of his mother, the other heir at law of ſaid *Honor*, in reſpect of real aſſets alſo deſcended to his ſaid mother, and now remaining in his ſeiſin and poſſeſſion, with liberty to apply for a ſale of the ſaid real aſſets in default of payment. His Lordſhip refuſed to give coſts; obſerving, that the parties had acted very properly, and that it was a queſtion very fit to take the opinion of the Court upon.

IN

In Chancery.

ELIZABETH JONES, widow, JOHN MADDEN, and ANNE his wife; EMMA THOMPSON, widow; WILLIAM FAIRBROTHER, and MARY his wife; THEOPHILUS CLEMENTS, and CATHERINE his wife; } Plaintiffs in the original cauſe.

ARTHUR COPE, ROBERT LINDSEY, and others, } Defendants.

Jones v. Cope, and the contrary.

In the Croſs Cauſe.—ARTHUR COPE, Plaintiff. The other parties in the original Cauſe, Defendants.

THIS caſe aroſe on the will of Sir *William Fownes*, Bart. and on the will of *Robert Cope*, containing an appointment in purſuance of a power

A. deviſes to *B.* for life, remainder to his firſt and other ſons in tail male, remainder over in truſt to convey the premiſes, and every or any part thereof, to ſuch child or children of teſtator's daughter and her then huſband, *other than and except their eldeſt ſon for the time being*, and the iſſue male or female of ſuch child or children (except before excepted) for ſuch eſtates, and in ſuch ſhares, and ſubject to ſuch limitations as ſhe, from time to time, by any deed or deeds, or by her will ſhall appoint; and for want of appointment by her, or for ſo much as ſhall not have been appointed by her, then as her huſband ſhall from time to time, by any deed or deeds, or by his will appoint: and for want of ſuch appointment, or for ſo much as ſhall not have been appointed, then as their eldeſt ſon for the time being ſhall appoint. The huſband, by his will (his wife having died without appointing) appoints to his younger ſons, by name, in tail, with croſs remainders in tail; and if all his ſaid younger ſons ſhould die without iſſue; then to his daughters. He dies, leaving his ſons the appointees, ſtill younger ſons; afterwards one of them becomes the only ſurviving ſon, the reſt being dead without iſſue; and then the truſt eſtate veſts in poſſeſſion by the death of *B.* without iſſue male. The daughters of the appointor claim the eſtate, conſidering the appointment to their ſurviving brother, as defeated by his being, as they ſay, an eldeſt ſon for the time being, and ſo excluded by the will of *A.* and the other brothers, the appointees being dead without iſſue. But it is decreed that the appointment to him continued undiſturbed. "*Time being*," means the time of the appointment's being made. The appointees were as if named in the will of *A.* The daughters can claim only under the appointment of their father, who limits it to them in the event of all his ſons, the appointees, dying without iſſue, which has not happened.

Jones v. Cope, and the contrary.

a power created by the will of Sir *William Fownes*.

Sir *William* at the time of making his will had one grandſon, *William*, by a deceaſed ſon, and one daughter, *Elizabeth*, the wife of Mr. *Robert Cope*. Being ſeized in fee of the premiſes in queſtion, he, on the 8th *April* 1734, duly made and publiſhed his laſt will, and therein deviſed them to the Hon. *Robert Lindſey*, one of the Juſtices of the Common Pleas in *Ireland*, and his heirs, to the uſe of *Robert* and *Elizabeth Cope*, and the ſurvivor of them, and the executors, &c. for the term of two years, to be computed from the day next after teſtator's death; and after the end of ſaid two years, (if his grandſon *William* was not married at the time of making the will, or ſhould not marry in teſtator's life-time without his conſent,) to the uſe of his ſaid grandſon for life, without impeachment of waſte, and from and after the determination of the eſtate, to the uſe of ſaid *Robert Lindſey* and his heirs, during the life of ſaid *William*, to ſupport the contingent remainders; and from and after his deceaſe, then to the uſe of the firſt, and every other ſon and ſons of ſaid *Willam* ſucceſſively, and the heirs male of their bodies. And in default of ſuch iſſue (or in caſe his grandſon was then married, or ſhould marry in teſtator's life-time without conſent, then from and immediately after the expiration of the ſaid two years) to the uſe of *Elizabeth Cope* for life, and after her deceaſe to the uſe of ſaid *Robert Lindſey* and his heirs " in truſt nevertheleſs to " ſettle and convey the ſaid premiſes, and every " or any part thereof, to and upon ſuch child or " children of the ſaid *Robert Cope* and *Elizabeth* " *Cope, other than and except their eldeſt ſon for* " *the*

" *the time being*, and the iſſue male or female, " of ſuch child or children (except before ex- " cepted) for ſuch eſtates, and in ſuch parts, " ſhares and proportions, and in ſuch ſort, man- " ner and form, and ſubject to ſuch powers, " limitations and appointments, as my ſaid " daughter *Elizabeth Cope*, from time to time, " during her life, by any deed or deeds, or by " her laſt will and teſtament in writing, or any " writing purporting to be her laſt will and " teſtament, to be by her executed in the pre- " ſence of three or more credible witneſſes, " ſhall direct, limit or appoint. And for want " of ſuch direction, limitation, or appointment, " or for ſuch part, or ſo much thereof as no " limitation, direction, or appointment ſhall be " made; then, as the ſaid *Robert Cope* ſhall, " from time to time during his life, by any " deed or deeds, or by his laſt will and teſta- " ment to be atteſted as aforeſaid, ſhall direct, " limit or appoint. And for want of ſuch di- " rection, limitation, or appointment, or for " ſuch part or ſo much thereof, as no direction, " limitation, or appointment ſhall be made; " then, as the eldeſt ſon for the time being of " the ſaid *Robert Cope* and *Elizabeth Cope* ſhall " direct, limit and appoint. And to and for " no other uſe, truſt, intent or purpoſe what- " ſoever "

Jones v. Cope, and the contrary.

Soon after the making of this will, teſtator died; and after the expiration of two years, his grandſon *William*, then Sir *William Fownes*, not having married in the life-time of his grandfather, entered and became ſeized under the will.

Mr. and Mrs. *Cope* had thirteen children, all living at the time of Sir *William* the teſtator's death,

Jones v. Cope, and the contrary.

death, *viz.* eight ſons, *William*, *Anthony*, *Henry*, *Robert*, *Arthur*, (the party in theſe cauſes) *Kendrick*, *Barclay* and *John*; and five daughters, *Elizabeth*, *Anne*, *Emma*, *Mary* and *Catherine*.

In *January* 1748, Mr. *Robert Cope* (his wife having died without making any appointment) made his will, and thereby made an appointment purſuant to the power given to him by Sir *William Fownes*'s will, in default of appointment by Mrs. *Cope*. There were then living of his and his late wife's children five ſons, *Anthony*, then his eldeſt ſon, *Robert*, *Arthur*, *Barclay* and *John*; and all the daughters. By this will Mr. *Robert Cope*, after reciting the power, appointed as follows: "I do by this my laſt will and teſta- "ment, executed, &c. direct, limit and appoint, "that the heirs of the ſaid *Robert Lindſey*, do "and ſhall ſettle and convey all and ſingular "the ſaid lands and premiſes, in manner herein "after mentioned; that is to ſay, to and upon "my younger ſons *Robert*, *Arthur*, *Barclay* "and *John*, to be equally divided among them, "ſhare and ſhare alike, as tenants in common, "and not as joint-tenants, and the ſeveral and "reſpective heirs of their bodies: and if one "or more of my ſaid younger ſons ſhall happen "to die without iſſue of his or their body or "bodies, then as to the ſhare or ſhares of him "or them, ſo dying without iſſue; to and upon "the ſurvivors of them, ſhare and ſhare alike, "to take as tenants in common, and not as "joint-tenants; and to the ſeveral and reſpec- "tive heirs of the bodies of ſuch ſurvivors. "And if all my ſaid younger ſons, but one, "ſhall happen to die without iſſue of their bo- "dies, then upon ſuch ſurviving or only "younger ſon, and the *heirs male* of his body.

"And

" And if all my ſaid younger ſons ſhall happen " *to die without iſſue of their bodies*, then to and " upon my daughters *Elizabeth Jones*, *Anne* " *Cope*, *Emma*, *Mary* and *Catherine Cope*, equally " to be divided amongſt them, ſhare and ſhare " alike, to take as tenants in common, and not " as joint tenants, and the ſeveral and reſpec- " tive heirs of their bodies; and if one or more " of my ſaid daughters ſhall happen to die " without iſſue of her or their bodies, then as " to the ſhare or ſhares of her or them, ſo dy- " ing without iſſue, to and upon the ſurvivors " of them, ſhare and ſhare alike, as tenants in " common, and not as joint tenants, and the " ſeveral and reſpective heirs of the bodies of " ſuch ſurvivors; and if all my ſaid daughters " but one, ſhall happen to die, without iſſue " of their bodies, then to and upon ſuch ſur- " viving or only daughter, and the heirs of her " body."

Jones v. Cope, and the contrary.

Mr. *Robert Cope* died in 1753, leaving *Anthony* his eldeſt ſon, and his ſaid four younger ſons, and his five daughters.

Sir *William Fownes* the grandſon died in 1778, without iſſue male; on which event the limitation to the truſtee and his heirs, for the benefit of the appointees was to veſt in poſſeſſion. Before which time, *Anthony*, the eldeſt ſon of *Robert* and *Elizabeth Cope*, and three of the four younger ſons named in the appointment of *Robert Cope*, were dead without iſſue, and *Arthur* had become the only ſurviving ſon of Mr. and Mrs. *Cope*.

At the time Sir *William Fownes* made his will, Mr. *Robert Cope* was tenant for life of the *Cope* eſtate, which had been limited in ſtrict ſettlement. His eldeſt ſon, *William*, having attained

Jones v. Cope, and the contrary.

the age of twenty-one, a re-ſettlement of the eſtate was made upon his marriage in 1742; under which, *William* having died ſoon after without iſſue, *Robert Cope* his father became ſeized in fee, aud he deviſed it in ſtrict ſettlement to his five ſons in ſucceſſion. He deviſed other lands which he had purchaſed to his ſon *Anthony* in fee, ſubject to a charge of 3000*l.* for each of his four unmarried daughters. Theſe lands *Anthony* deviſed to *Arthur Cope*, the party in theſe cauſes; who upon the deaths of his brothers *Anthony* and *Robert* without iſſue, became ſeized of all the *Cope* eſtates.

The original bill was filed in 1779, to have a conveyance of the *Fownes* eſtate made to the daughters under the appointment to them by their father; they conſidering the appointment to *Arthur*, as having become void; and the other appointees being dead without iſſue, the croſs bill was filed by *Arthur Cope*, in order to have a conveyance made to him, in purſuance of his father's appointment.

This caſe was argued by Mr. Serjeant *Fitzgerald* and Mr. *Duquery* for the Plaintiffs in the original cauſe, and by Mr. Solicitor General, Mr. *Wolfe*, and Mr. *Boyde*, for *Arthur Cope*. *

* It was argued by other counſel on each ſide; but we were not ſo fortunate as to be preſent during their arguments.

For the Plaintiffs in the original cauſe.—This queſtion turns upon the conſtruction of Sir *William Fownes* the grandfather's will. From his bounty to the children of his daughter, this eſtate has been derived, and his intent muſt govern the courſe of it now. An appointee takes not from the appointor, (who is a mere inſtrument) but from him who created the power of appointment. This too, is the caſe of an executory truſt; and in ſuch particularly, it is the endeavour of this court to find out and purſue

ſue the intention of the parties. "In execu- Jones v. Cope, and the contrary.
"tory truſts the teſtator leaves ſomething to be
"done; the truſts are to be executed in a more
"careful and more accurate manner, agreeably
"to what appears to be the intention of the
"teſtator." *Glenorchy* v. *Boſville. Talb.* 3. This holds not only in the caſe of wills, but of articles, 2 *Atk.* 456.

Robert Cope made his will with the deſign of purſuing the intention of Sir *William Fownes*; he recites the power and refers to it. But if he has not executed it agreeably to Sir *William*'s will, or if his appointment has become by ſubſequent events, repugnant to it; the power muſt now be executed agreeably thereto. From Sir *William*'s excluding the eldeſt ſon for the time being, it manifeſtly appears to have been his intention to give his eſtate as a proviſion for the younger children, and to keep the *Fownes* eſtate from uniting with that of the *Cope* family. The words "*eldeſt ſon for the time being*," denote a continuing incapacity in whatſoever ſon ſhould happen to be eldeſt, of enjoying the *Fownes* eſtate. The words ſhift their application according to the event. Here they ſhew that he did not mean to exclude any particular eldeſt ſon; for Mrs. *Cope* had many ſons then living, but he names none of them. Were the teſtator now to riſe from the dead, and to be aſked, what his intention was, can it be imagined that he would ſay it was his intention to give his eſtate to *Arthur Cope*, already poſſeſſed of all the family eſtates? No! he would ſay, his intention was to exclude him, and to make a younger branch. Could any doubt be entertained of this, it is cleared up by his giving a power of appointment to the eldeſt ſon, for

Jones *v.* Cope, and the contrary.

the time being. The teſtator devolves on him, the truſt of appointing to the younger children: he is put *loco parentis*, for their benefit; he could not appoint to himſelf. This circumſtance, makes this caſe ſtronger than any in the books. If your Lordſhip ſhould decree for *Arthur Cope*, it muſt be from ſome rule of law or equity, binding you from following the teſtator's intention, which was clearly in favour of the younger children: and your Lordſhip will lean in ſupport of them, againſt one, who is already amply provided for.

A voluntary gift by a grandfather to younger children, is to be conſidered as a proviſion made for them, in the marriage ſettlement of the father and mother; upon the authority of *Teynham* v. *Webb*. 2 *Vezey*, 198. Portions are to be conſidered with reſpect to the times at which they are to veſt. In the preſent caſe, there are three periods to be conſidered. The firſt is, the time of *Robert Cope*'s making the appointment in 1748. The ſecond is the time of his death in 1753; and the third is, the time of Sir *W. Fownes* the younger's death, without male iſſue, in 1778. This laſt period, we contend, is the time when the diſtinction of elderſhip and youngerſhip is to take place. It cannot be the firſt, for the appointment was made by will, which could not operate 'till the death of *Robert Cope*. The appointment partook of all the properties of a will, and therefore, at the time of making, veſted no abſolute right; it ſtill continued defeazible and ambulatory. 1 *Veſey*, 139. But though it had been by deed, it ſtill would have been defeazible, from the poſſible incapacity of the appointees; and that poſſible incapacity to take, continues

to

to the time of payment. *Chadwick* v. *Doleman.* 2 *Vern.* 531. (And ſo it was conſidered by Lord *Hardwicke*, in *Teynham* v. *Webb.*) There a new appointment to younger children, one of the former appointees having become an eldeſt ſon, was held good. If *Robert Cope* had appointed by deed, and one of the appointees in his life-time had become an eldeſt ſon, he might have made a new appointment, upon the authority of that caſe. Jones v. Cope, and the contrary.

Neither could it be the ſecond period, for *Robert* had but a naked power, without any intereſt, ſo that nothing veſted upon his death. A conveyance might have been called for by the children, in his life-time, if Sir *William* the younger, had died without iſſue male. The period meant by the words, *time being*, was when the truſt eſtate, veſted in poſſeſſion in *Robert Lindſey*, for the benefit of the family; that is in 1778, when Sir *William Fownes* the younger was dead, without iſſue male. The conveyance directed by the grandfather's will, is to be made out of the truſt eſtate, which could only ariſe upon that event, when all the prior eſtates were ſpent. To ſupport the claim of *Arthur Cope*, the truſt eſtate muſt be called into being in 1748, and this for the purpoſe of giving it from the younger children, to the eldeſt, contrary to the teſtator's intent. Upon the death of Sir *William Fownes* the younger, what was the truſtee to do? he is firſt to look into the will of Sir *William* the grandfather, and there he ſees that *Arthur Cope*, is the very perſon excluded by it: then into that of *Robert*, but under the controul of the former; he ſees it would be a breach of truſt, to convey to *Arthur*, as the appointee of *Robert*. In making the

Jones v. Cope, and the contrary.

the appointment, *Robert Cope* had the very ſame intention that Sir *William* had in giving the power, and his appointment ceaſes to operate in favour of *Arthur*, upon his becoming an eldeſt ſon. He deſcribes the appointees, and appoints to them as his younger ſons. In *Beal* v. *Beal*, referred to in 2 *Vezey*, 210, it was laid down by Lord *Harcourt*, that younger children ſhall be conſidered; ſuch as do not take the family eſtate, are not the head and repreſentative of the family; therefore the younger ſons intended by *Robert Cope*, muſt be taken to be ſuch, as do not take the *Cope* eſtate. The appointment to the daughters remains valid; for an appointment under a power, may be good only in part, and ſhall operate *pro tanto*. In *Teynham* v. *Webb*, the eldeſt ſon did not die till four years after the death of his father, which brings it nearer to the preſent caſe; and there too the truſt eſtate did not veſt, till Lord *Teynham* had become an eldeſt ſon. Suppoſe no appointment had been made, the truſtee muſt go to this very *Arthur Cope*, and learn from him, whom he would appoint, under the power given to him as an eldeſt ſon at the time. In 1778, the truſt eſtate veſts in poſſeſſion, and how does it look towards *Arthur Cope*? it ſees him inveſted with all the *Cope* eſtates, encircled round with wealth. It ſhould ſeem as if the teſtator had foreſeen this very event; in directing the eldeſt ſon, for the time being, to be excluded: nor can it be held hard upon him to do ſo, under theſe circumſtances. Equity is guided in its deciſions of ſuch caſes by the proportions of wealth. A daughter of twenty years of age is conſidered a younger child than her brother of two, becauſe unprovided for; and an eldeſt

ſon

ſon unprovided for, is held a younger child; this is laid down in the caſes referred to, in 2 *Vezey*, 203. Jones v. Cope, and the contrary.

Broadmead v. *Wood*. *Brown*'s *Ch. Ca.* 77. is a ſtrong caſe in point. There the truſt term was not to ariſe, 'till after the death of the wife. *Anthony* the ſecond ſon, though appointee by name, was held incapable of taking, becauſe before the truſt eſtate aroſe he became an eldeſt ſon; in that caſe, there was no new appointment, as there was in *Chadwick* v. *Doleman*. If upon the death of *Robert*, the younger children had called for a conveyance, your Lordſhip would have refuſed it, upon the authority of *Teynham* v. *Webb*; you would have ſaid to them, "You have only a defeazable "intereſt, wait 'till the beneficial eſtate ac-"crues." Where an inconvenience may ariſe by ſuſpending the veſting of a portion, the court will take an earlier period. But what inconvenience can ariſe here? here all was contingent, it was uncertain whether the truſt eſtate would ever come into poſſeſſion. No benefit could ariſe to the family, by conſidering an intereſt given by the appointment, as veſted abſolutely at an earlier period, than the time when the beneficial eſtate accrued. "Younger chil-"dren," means thoſe living when the beneficial intereſt ariſes. *Elliſon* v. *Airey*, 1 *Vezey*, 111. So here the eldeſt child at the time the beneficial intereſt accrued, is to be excluded, and the younger at that time to take; your Lordſhip now ſtands in *loco parentis*, and are bound to execute the power in favour of the younger children. It is ſaid the appointment by *Robert Cope*, cannot be reſcinded; but he might have made a new appointment. He could do ſo only

Jones v. Cope, and the contrary.

only from the change of the ſituation of the appointees, one of them having become an eldeſt ſon: upon the ſame ground, (*Arthur Cope* having become an eldeſt ſon) it is competent to your Lordſhip to do the ſame, and in executing this power for the benefit of the family, to do what *Robert* might have done, had theſe events happened in his life-time. If *Robert* had, contrary to the direction of teſtator, appointed the eſtate to the eldeſt ſon, ſuch appointment would have been void; it may now be conſidered ſo, and in that caſe, courts of equity will not, for want of appointment let the bounty be loſt, to thoſe who were intended to be benefited by it, but appoint themſelves in their favour.

For *Arthur Cope*.—It has been contended on the other ſide, that it was the intention of Sir *William Fownes*, the teſtator, that the *Cope* and *Fownes* eſtate ſhould never unite, and that the elder ſon for the time being, of *Robert* and *Elizabeth Cope*, ſhould ever be excluded from enjoying the *Fownes* eſtate, and that he intended to make a ſecond branch; but no ſuch thing appears in the will itſelf. The teſtator betrays no ſymptoms of family pride; he does not give his eſtate to one younger ſon, requiring him to take his name; but gives a power of appointment, by which it might be entirely given to females, or parcelled out amongſt the thirteen children. He never had in contemplation the event that has happened, of there being but one ſurviving ſon. Your Lordſhip will not now, by a forced conſtruction of the teſtator's will, diveſt the intereſt, which has veſted in *Arthur Cope*, by the appointment to him, when a younger ſon. Sir *William Fownes* deſired that his eſtate, in caſe of failure of male iſſue of his grandſon, ſhould

ſhould go to the children of his daughter *Cope*, and in default of appointment by her, he gives her huſband a like power of appointing it, to the children of the marriage, in ſuch ſhares as he ſhould think proper; judging that he would be beſt enabled to execute the truſt, from a knowledge of the circumſtances of the family. He excludes indeed from the benefit of an appointment, the eldeſt ſon for the time being, preſuming that he muſt be otherwiſe provided for. Theſe words, "time being," relate to the time of the appointment's being made; they are uſed with that application in acts of parliament, as in that relating to the eſtate of Lord *Ranelagh*, a lunatic, impowering the committee, and the Lord Chancellor for the time being, to make leaſes. No other conſtruction can be put on theſe words, in the latter part of the ſentence, where the teſtator gives a power of appointment to the "eldeſt ſon for the time being," and the ſame conſtruction muſt be adopted of the ſame words, in the ſame ſentence. Can it be imagined, that Sir *William Fownes* meant that one of the younger ſons, who eventually became the eldeſt, ſhould on that account, be excluded from all benefit from the *Fownes* eſtate; though at the ſame time, he was ſtripped of the *Cope* eſtate, by its having been waſted or deviſed away from him; which might have been the caſe, for *Robert Cope*, and *William* his ſon, ſuffered a recovery. It is by mere accident that *Arthur Cope* enjoys the family eſtates; he holds them under deviſes to him, and is not poſſeſſed of a ſingle acre, under the family ſettlement, as an elder ſon. Why was the eldeſt ſon incapacitated? becauſe he was otherwiſe provided for; ſo are the preſent plaintiffs: one in her father's

Jones v. Cope, and the contrary.

Jones v. Cope, and the contrary.

father's life-time, the others by a charge of 12000*l.* made by *Robert Cope* on that eſtate, by the taking of which, it is contended, *Arthur Cope* ſhall be incapacitated from taking the *Fownes* eſtate. He pays plaintiffs a compenſation for their excluſion; and ſhall he be deprived of both the purchaſe money and the purchaſe? and ſhall the daughters, who have received the money as a compenſation, alſo receive that for which the compenſation was given? will you ſay, the eldeſt ſon is not to take the *Fownes* eſtate, becauſe he has received a compenſation for the excluſion; yet that the daughters, who have alſo received a compenſation, ſhall take notwithſtanding.

The will of Sir *William* the teſtator, and the appointment of *Robert Cope*, are to be taken together as one inſtrument; the appointees take, as if they had been named in the will of Sir *William*; and the eſtate is to be conſidered as veſted at the time of the appointment. Upon the death of Sir *William* the grandfather, it veſted in the truſtee; it was executory indeed in him; and on the death of *Robert Cope*, whereupon the appointment became compleat, the appointees had a right to call for a conveyance; and equity conſiders that as done, which ought to have been done. The truſtee is directed to convey to the appointees of *Robert* or *Elizabeth*, and it was not probable that either of them ſhould live till a failure of iſſue, of Sir *William* the younger; and he is to make, not one entire conveyance only, but ſeveral of different parts, to the appointees from time to time. It certainly was the intention of Sir *William* to confer ſome benefit on the children of his daughter; but were their intereſt in it to be defeazable,

and

and to be perpetually diveſting and ſhifting, according as the appointees might happen to become eldeſt ſons, 'till a failure of male iſſue of the grandſon; his intended bounty could be of no ſervice to them. Jones v. Cope, and the contrary.

There is no inſtance of this court interpoſing, to diveſt an eſtate once veſted, except in the caſe of portions; as in *Chadwick* v. *Doleman*, which bears no ſimilitude to this. That was merely a power, created in a marriage ſettlement, of appointing portions for the younger children. A former appointee having become an eldeſt ſon, the father made a new appointment. It was held, that there was a tacit condition annexed to the firſt appointment, that the appointee ſhould not become an elder ſon. Here there was not any new appointment. Nor can this, be at all conſidered as a portion caſe In ſuch the Chancellor puts himſelf in the ſituation of the parents, at the time of the events happening, whereupon the portions are to veſt in poſſeſſion; and thoſe cited, only apply to perſonal property. Here the teſtator gives a power of appointing the whole to any one. He had no intention of diſpoſing of it to his daughter's family, otherwiſe than as his daughter or her huſband ſhould appoint; they might have appointed it in fee, to any one of the children. Whereas, if this is to be conſidered a portion caſe in any reſpect, it muſt be ſo conſidered throughout, and the court would have ſet aſide an appointment to one child only. In the caſe of portions, the diſtribution is to take place immediately on the death of the parent, or of a life in being: but here the remainder to the truſtees for the benefit of the children, might perhaps never have veſted in poſſeſſion; and probably

Jones v. Cope, and the contrary.

bably not 'till after a conſiderable lapſe of time, upon Sir *William* the younger's dying without any male iſſue at the time of his death; or ſuch iſſue dying before the age of twenty-one. This too is a limitation of a real eſtate, and no caſe has ever gone ſo far, as to diveſt a real eſtate, that has once veſted in a perſon fully qualified to take at the time of the appointment, and alſo at the time of the death of the appointor There is no inſtance, where ſuch an intereſt has been deveſted, not for the purpoſe of including after-born children, but of excluding children born before, and then qualified to take. Another objection to its being conſidered as a portion caſe, is, that the daughters, the preſent plaintiffs, are otherwiſe provided for. Then again, portions are proviſions for children made by their parents, or by others in lieu of ſuch. This gift can only be conſidered as a *bounty*. Portions are *debts of nature*. Lord *Hardwicke* takes that diſtinction in 3. *Atk.* 222. "It has "been ſaid," ſays his Lordſhip, "that the "moſt liberal conſtruction ought to be made in "the caſe of portions. I do agree in thoſe "caſes, where a father is making a proviſion "for children, which is called, a *debt of na-* "*ture*, the court will ſtrain in their favour; "but this is the bequeſt of a collateral relation, "and is a mere bounty only." It has been ſaid, that *Teynham* v. *Webb*, was the caſe of a gift by a grandmother. But it was in lieu of a proviſion which ought to have been made, and was ſo conſidered by the parties themſelves; under the particular circumſtances of the caſe, the grandmother was held to be *loco parentis*. In the caſe of voluntary proviſions, the firſt appointment is held to be indefeazable; this is acknowledged

acknowledged in *Chadwick* v. *Doleman*, and alſo in *Teynham* v. *Webb*. *Broadmead* v. *Wood*, (beſides, that it was a caſe of portions, which we deny this to be) is diſtinguiſhed from the preſent, by the words, " or the ſon poſſeſſing the " eſtate."

Jones v. Cope, and the contrary.

In *Trafford* v. *Aſhton*, 2 *Vern.* 660. A man deviſed his eſtate in truſt, for his daughter for life, remainder to the ſecond ſon of her body in tail-male, and ſo to every younger ſon; adding, that he did not deviſe it to the eldeſt, becauſe he expected his daughter to marry ſo prudently, as that the eldeſt would be provided for. It was held that it veſted in the ſecond born ſon, notwithſtanding he was the elder ſon, by the death of the firſt born, and contrary to the wiſh of the teſtator.

If *Robert Cope* had no power to make this appointment, it is void, and he died without making any; and without an appointment in their favour, the daughters can have no claim. He has appointed to them, only in the event of all his younger ſons named *dying without iſſue*; that event has not yet happened; ſo that unleſs *Arthur Cope* can take, none of the children can take; though it was Sir *William*'s intention that ſome of them ſhould. The ſame objection would lie to a ſimilar claim ſet up by the younger brothers of *Arthur*, (were they alive) to the ſhare given to him. By the appointment they could have no right to it, 'till *Arthur* ſhould be dead without iſſue.

On the 31ſt of *July* 1786, Lord *Chancellor* delivered his opinion. Having ſtated the caſe, and the events that had happened, his Lordſhip proceeded.—Under theſe circumſtances the plaintiffs in the original cauſe, brought their bill

Jones v. Cope, and the contrary.

bill, to have a ſettlement and conveyance made by the heir of *Juſtice Lindſey*, to them, under the appointment to the daughter, inſiſting that as three of the four younger ſons, the appointees, are dead without iſſue, and as the fourth, viz. *Arthur*, is become, as they ſay, an eldeſt ſon within the meaning of Sir *William Fownes*'s will, the appointment to him is become void, and therefore, it is the ſame as if all the four had died without iſſue, ſo that the limitation to the daughters has taken place.

On the other hand Mr. *Arthur Cope* has brought his croſs bill, praying that the heir of *Juſtice Lindſey* may be decreed to convey to him, according to his father's appointment, by which an equitable eſtate in remainder veſted in him; inſiſting, that the event upon which the lands were to go to his ſiſters has not happened, viz. the four younger ſons named in his father's appointment, dying without iſſue, he, one of them, being living

The caſe has been very well and ably argued on both ſides. For the plaintiffs in the original cauſe, it has been argued on the grounds I have mentioned, and it has been compared to the caſes which have happened reſpecting portions and proviſions for younger children; where a younger child has become an eldeſt ſon, and the caſes of *Chadwick* and *Doleman*, in 2 *Vern.* and Lord *Teynham* v. *Webb* in 2 *Vezey*, have been particularly cited and relied on. On the other ſide, a great many material things have been offered, and the caſes cited have been anſwered, by ſaying, that they do not apply to the limitation of real eſtates, but govern only in caſes of portions, and pecuniary proviſions for younger children, which make a particular ſubject of equity:

equity: that this is a limitation of a real eſtate, after the determination of an eſtate tail; which is a caſe exceedingly different from caſes of portions for younger children. Jones v. Cope, and the contrary.

I have given the caſe the moſt deliberate conſideration, and do conceive, that it muſt be determined by what was the meaning of Sir *William Fownes*, in uſing the words, "*for the time* "*being*." what he meant by "the *eldeſt ſon* "*for the time being*." The power which he gives to his daughter, Mrs. *Cope*, and to his ſon-in-law, ſeems to be meant as a kind of floating power, during their lives reſpectively. The words, "*from time to time*," ſeem to import, that each of them ſhould have a power to appoint, from time to time, during their lives, reſpectively, according to the ſtate and circumſtances of the family; but if the power of appointment ſhould come to an eldeſt ſon, the floating quality ſhould ceaſe. And I do conceive, that in caſe of an appointment by Mrs. *Cope*, or by her huſband Mr. *Cope*, it meant ſuch as ſhould be eldeſt, at the time of the appointment made. The appointment then became perfect and compleat, and the appointees were then in the ſame ſituation, as if in the will of Sir *William Fownes*. A power like this, is a contrivance to execute by another at a diſtance of time, what the party would do himſelf, if he could ſee into futurity. The appointor acts as agent. It is the ſame, as if the appointees by name, were inſerted in the original will.

The plaintiffs can take only under the appointment of *Robert*, who gives the eſtate to them only in the event of all the four younger ſons named, dying without iſſue. The words of the appointment are very remarkable. The daughters

Jones v. Cope, and the contrary.

daughters were to take, *if all the four younger ſons ſhould die without iſſue.* That was his appointment, and to give it a different conſtruction, would make his appointment act contrary to his intent.

This is not the caſe of portions, or pecuniary proviſions for younger children, which ſtand on a different ground, and thoſe caſes do not apply to this, which is a limitation of a real eſtate, in a manner that the appointees were as if named in the will, and therefore, *the time being*, muſt be when the appointment became compleat. I am, therefore of opinion, that the appointment to *Arthur*, continued undiſturbed, as a good limitation. I ought to decree the truſtee to convey to *Arthur*, and the heirs male of his body, with remainder to the heirs of his body generally, and for want of ſuch iſſue to the daughters, and the heirs of their bodies, ſeverally and reſpectively, as tenants in common, with croſs remainders to each other in tail. Therefore, diſmiſs the original bill, ſo far as it ſeeks a conveyance, excluſive of *Arthur Cope*, and decree in the croſs cauſe in the manner I have mentioned.

No coſts on either ſide, except to the truſtee, &c.

End of TRINITY TERM, 1786.

MICHAEL-

Michaelmas Term

27 Geo. III. 1786.

In the Exchequer.*

Archibald Stewart, and Jane his wife; Robert Clements, and Elizabeth his wife, and Frances Henry, Plaintiffs.

Alexander Henry, Margaret Henry, widow and executrix of John Henry, and others, Defendants.

Stewart & al.' *against* Henry & al.'

Teſtator having a power of appointing lands to ſuch of his ſons, in ſuch ſhares and for ſuch eſtates, and with ſuch limitations over as he ſhould think proper (in default of whoſe appointment the lands were to go to his firſt and other ſons in tail-male, ſucceſſively) appoints them by will to A. his eldeſt ſon, for life, remainder to his firſt and other ſons in tail-male, ſucceſſively;—remainder, *ſubject to a charge of* 1000*l. to teſtator's daughters*, to B and C. his ſecond and third ſons, for their lives, as tenants in common, with ſeveral remainders in tail to their iſſue. And he makes ſeveral immediate deviſes to B. and C. After teſtator's death A. dies without iſſue, B. and C. are not bound to confirm that charge made on the remainder in the event of its veſting in poſſeſſion.

THE queſtion in this caſe aroſe upon a charge of 1000*l.* in the will of *John Henry* (father of the plaintiffs, *Jane*, *Elizabeth* and

* The Caſe of the leſſee of *Freeman* v. *Boyle*, upon a demurrer to evidence, received the determination of this Court, on the laſt day of this term. But as a writ of error was brought thereon, which is now depending in the Exchequer Chamber, (*vacation after Eaſter term* 1787) the publication of that caſe muſt be deferred until it ſhall have received a final deciſion.

Stewart & al.' *againſt* Henry & al.' *Frances*, and of the defendants, *Johnſton* and *Alexander Henry*) upon the lands comprized in the ſettlement made upon his marrige with the defendant *Margaret*. By that ſettlement he was made tenant for life of thoſe lands; remainder to the uſe of truſtees, and their heirs; ſubject to a truſt term of 500 years, and to an annuity of 70*l. per ann.* for his widow, in truſt, if there ſhould be two or more ſons of the marriage living at the time of the death of *John*, for ſuch of ſaid ſons, in ſuch ſhares and proportions, and for ſuch eſtate therein to him or them reſpectively, and with ſuch limitations and remainders over, as the ſaid *John* ſhould by deed or will direct, limit and appoint: and for want of ſuch direction, limitation and appointment, then to the uſe and behoof of the eldeſt of ſuch ſons, and the heirs male of his body; with like remainders over to the ſecond and other ſons, ſucceſſively. The truſt of the term is declared to be, to raiſe 2000*l.* for the daughters and younger ſons, ſubject to his appointment and diſtribution; and in default thereof, to be equally divided amongſt them. A power is given to *John Henry*, to charge the lands, by deed or will, with the ſum of 1500*l.* for ſuch uſes as he ſhould think proper to direct in ſuch deed or will.

John Henry had iſſue of this marriage, three ſons, *James*, *Johnſton* and *Alexander*; and two daughters, *Jane* and *Elizabeth*, born before the making of his will: He had alſo one ſon, named *John*, by a former wife, and was ſeized of a reverſion in fee expectant upon the death of his ſaid ſon *John* without iſſue male, in lands of inheritance; he had a ſmall fee farm eſtate, called *Upper-livery*; and a leaſe for lives renewable

able for ever in *Ballynafeigh* and *Moſtragee*, of conſiderable value; and he had a leaſe for lives determinable, in *Ballybreak*. Stewart & al.' *againſt* Henry & al.'

Under theſe circumſtances, he on the 19th *April* 1764, made his will, and therein deviſed *Ballynafeigh* and *Moſtragee*, charged with 500*l.* to be equally divided amongſt his daughters and iſſue unborn, in truſt for his ſon *James*, for life, and after his deceaſe to permit his firſt and other ſons ſucceſſively, to receive the rents until the eldeſt ſhould attain the age of twenty-one, and then to convey to ſuch eldeſt ſon and his heirs; but in caſe none of them ſhould attain that age, he makes like limitations to his ſons *Johnſton* and *Alexander* ſucceſſively, and their iſſue; but in the event of theſe lands coming to *Johnſton* or his iſſue, his ſhare of *Upper-livery* is to be conveyed to *Alexander*, and any unborn male iſſue of the teſtator. *Upper-livery* he gives to *Johnſton* and *Alexander*, and their heirs, as tenants in common. He deviſes his reverſion in fee to them in like manner, and alſo his eſtate in *Ballybreak*. As to the lands comprized in the ſettlement; after reciting his power of appointment in the very words of the ſettlement, and expreſſing his intent to execute that power, he diſpoſes of them thus: To his ſon, *James Henry*, for life; remainder to his firſt and other ſons ſucceſſively, in tail-male; remainder, *ſubject to* 1000*l. for his* (the teſtator's) *daughters, and iſſue unborn*, to his ſons, *Johnſton* and *Alexander* for their lives, as tenants in common, with remainders to their firſt and other ſons reſpectively. The 2000*l.* to be raiſed under the truſt-term, he appoints equally amongſt his daughters, younger ſons, and iſſue unborn. He charges the 1500*l.* ac-

Stewart & al.' *againſt* Henry & al.'

cording to the power given him by the ſettlement, and directs the reſidue of that ſum and his perſonal eſtate after payment of his debts, alſo to be equally divided amongſt his daughters, younger ſons, and unborn iſſue.

After making this will, he had iſſue another daughter, *Frances*; and 13th *February* 1773, he made a codicil, whereby he bequeathed to his daughters the further ſum of 1000*l.* to be raiſed by ſale or mortgage of *Ballynafeigh* and *Moſtragee*, and he impowers truſtees, by ſale or mortgage of *Upper-livery*, to raiſe any ſum they ſhould think proper to advance his ſons *Johnſton* and *Alexander* in trade; and if no ſale or mortgage be made, then it is to remain to his ſaid ſons, as by his will. *Ballybreak* he now gives to *Johnſton* alone.

In 1773 the teſtator died. In 1778 his ſon *James* died without iſſue, whereupon the remainder limited to *Johnſton* in *Ballynafeigh* and *Moſtragee* took effect, and he and *Alexander* came into poſſeſſion of the ſettled eſtates; and on the death of *John Henry* the ſon, without iſſue, in 1779, they became ſeized in poſſeſſion of his lands under the deviſe of the reverſion by the will of their father. This Bill was filed, to be decreed thoſe two ſums of 500*l.* and 1000*l.* charged on *Ballynafeigh* and *Moſtragee*; alſo three fifths of the 2000*l.* charged on the ſettled eſtates; and to have the ſum of 1500*l.* raiſed, and to be decreed three fifths of the reſidue of it and the perſonal eſtate of teſtator after the payment of his debts; and likewiſe the ſum of 1000*l.* charged by the teſtator on the ſettled eſtate, in the event which has happened of that eſtate's coming to the defendants *Johnſton* and *Alexander*.

De-

December 11, 1786. *Yelverton*, Lord Chief Baron, having fully ſtated the caſe, delivered the opinion of the court. Stewart & al.' *againſt* Henry & al.'

As to the two ſums of 500*l.* and 1000l. charged by the will and codicil on *Ballynafeigh* and *Moſtragee*, and as to three fifths of the charge of 2000*l.* and the charge of 1500l. on the ſettled eſtate: no doubt can be entertained of the rights of the plaintiffs to have theſe ſeveral ſums raiſed by a ſale of a competent part of the eſtates charged therewith. The two firſt are charged on an eſtate which the teſtator had full power over, to do what he pleaſed with; and the two latter are charged on the ſettled eſtate in purſuance of his power. But the queſtion is whether they are, or are not intitled to have the additional thouſand pounds charged on the ſettled eſtate in the event which has happened of that eſtate's coming to *Johnſton* and *Alexander*, raiſed by a ſale thereof. Now that the teſtator was not warranted by his power to charge the ſettled eſtate in any event with this additional ſum of 1000l. is and muſt be given up. But it is ſaid that where a deviſee takes a gift under a will, the law annexes a condition to the gift, that he ſhall not diſpute any other part of the will, even though that other part gives away from him ſomething to which he had an undoubted right: but that he muſt make his election whether he will renounce the particular gift to him by the will, or abide by the will altogether. This is certainly a good general rule, but it is as certain that it has many exceptions. One of theſe exceptions is, where the teſtator himſelf annexes a condition to the gift. For where the teſtator himſelf

Stewart & al. against Henry & al.

himſelf has ſaid what ſhall be the conſequence of the deviſees diſputing a particular part of his will, and what loſs the deviſee ſhall ſuſtain by diſputing it, he ſhall ſuſtain that loſs and no other; and may take another gift under the ſame will, according to the rule of law that *expreſſum faci ceſſare tacitum*. As where a man deviſes lands or money to his wife in lieu of dower: ſhe ſhall not have both, but ſhe may take any other benefit given her by the will; for the Court will not conſtrue it in lieu of every thing, where the teſtator has named a particular thing; according to the rule in 2 *Veſ.* 33. And under this exception falls the caſe of *Bor* and *Bor* (5 *Brown's* P. C. 165) as determined by the Lords, and it was by not attending to this exception, that Lord *Jocelyn* made the decree, which was reverſed by the Lords. There *Chriſtian Bor* ſeized for life of *Pelletſtown* &c. with remainder to his firſt and other ſons in tail: and in fee of *Ballynunry*, &c. and having four ſons *John*, *Gerard*, *Jacob*, and *William*, he deviſes *Ballynunry* to *Gerard*; and *Pelletſtown* to *Jacob* and *William*. But, ſays he, "If I have not a power to deviſe *Pelletſtown* in this manner (as he certainly had not) then the ſhare of 2000l. mentioned in my marriage ſettlement, by this will left to *Gerard*, muſt go to *Jacob* and *William*." There the teſtator himſelf annexed the condition, ſo there was no occaſion for the law to imply any other.

Mr. Solicitor General has ſaid this is the only exception: but there are ſome others; for another exception is, (and the caſe ſuggeſting it has been cited by the Solicitor himſelf) where the deviſee does not diſturb the deviſe in *toto*, as

as was the caſe in *Noys* and *Mordaunt*, but only claims an excreſcent intereſt out of the eſtate for a time, and then ſuffers it to go according to the diſpoſition made thereof by the will. As where a wife claimed dower out of the very eſtate, of which a remainder was limited to her by the will of her huſband, and was allowed to do it, Lady *Northcote*'s caſe 3 *Atk.* 436. Nor does the caſe in 1 *Brown* P. C. 538. impugn this doctrine, inaſmuch as a preſent eſtate in half the lands was there given to the wife, though ſubject to debts and legacies. Stewart & al.' *againſt* Henry & al.'

So where it might be collected from the whole tenor of the will, that it was not the teſtator's intention to exclude the deviſee claiming a right contrary to the letter of the will, from any other benefit under it; which is the caſe of *Eaſt* v. *Cook*. 2 *Veſ.* 30. Where the teſtator intending to carry into execution his father-in-law's will, but miſtaking it, did not; but gave the plaintiff 500l. only, where the father-in-law intended he ſhould have 1000l. the plaintiff was decreed to 1000l. and not excluded from any other legacy given him by the teſtator.

To theſe exceptions I will take the liberty, and I think I am well warranted, to add another, and that is, where the teſtator bequeaths a preſent gift to a remainder man after an eſtate tail, and by the ſame will either gives the lands to another having no power to give them, or ſubjects the remainder to a charge to which he had no power to ſubject it; in neither caſe is the remainder-man ſubject to the equity of making his election whether he will renounce all benefit under the will, or do all in his power to make

Stewart & al.' against Henry & al.'

make good the deviſe of the remainder in the one caſe, or confirm the charge in the other. This may be illuſtrated by the Caſe of *Bor* and *Bor*. There *Gerard* had but a remainder in tail in the lands of *Pelletſtown*, expectant on an eſtate tail in his brother *John*; and he was a deviſee in the will of his father, which, contrary to that limitation, gave thoſe lands to *Jacob* and *William*. If upon the teſtator's death he had been called upon, as being ſubject to the equity, to confirm this deviſe, though he ſhould conſent or be directed to do ſo, as far as he could, by levying a fine to bar his iſſue, yet he would have done it to no purpoſe, for *John* might the next moment by a recovery, have barred all the remainders. And though my Lord *Hardwicke*, according to the note of his argument on that caſe, avoids giving any opinion on this point, as not before him; yet it is not difficult to collect what his opinion would have been in caſe ſuch a point had come before him. For he ſays expreſsly, "That, in caſes of wills, things are to be conſidered as they ſtood at the time of the teſtator's death, and that it would be dangerous to conſider them in any other light." And again, "That theſe tacit conditions ought to be conſtrued as they ſtood at the death of teſtator." And further, "That the implication which raiſes a condition of this kind muſt be a neceſſary implication, ſomething as if *ſcriptum* in the will; for that otherwiſe an implication might be raiſed contrary to the intent." Now to apply theſe obſervations to this caſe: Suppoſe the plaintiffs had come at the death of the teſtator, and in the life-time of *James*, to have this

this ſum of 1000l. decreed a charge on the remainder limited to *Johnſton* and *Alexander*; could the court ſay, either you ſhall conſent to take this remainder ſubject to this charge, or you ſhall take nothing at all under the will? Even if they did conſent, their conſent could not bind their iſſue, becauſe they are only tenants for life. And even if it could, yet that and the remainder itſelf might be annihilated by a recovery to be ſuffered by the iſſue of *James*. Such a Decree therefore would, to uſe my Lord *Hardwicke*'s words, give the plaintiffs only ſo much moonſhine, and would not be a fit decree to be made; and if not at the death of the teſtator, neither is it a fit decree to be made now. Stewart & al.' *againſt* Henry & al.'

Hitherto I have conſidered the queſtion as if the power of diſpoſing of the ſettled eſtate among teſtator's ſons were executed. But ſuppoſe, according to the caſe cited for the purpoſe, that the execution of it is void, as to his grandchildren; then *Johnſton* and *Alexander* would take only eſtates for life, expectant on the death of their brother *James*; and after their deaths the lands would go back to the iſſue of their brother *James* under the ſettlement, and then to their own iſſue ſucceſſively. The grandchildren then would not take any thing under the will, but all under the ſettlement, and could not be put to make their election, even if adults, according to *Bor* and *Bor*: and *Johnſton* and *Alexander* would take only eſtates for life, which could not bear the charge.

And though it has ſo happened that *James* is dead without iſſue, yet that ought not to alter the caſe; if it be true, as my Lord *Hardwicke*

Stewart & al. *againſt* Henry & al.

wicke declares, that theſe tacit conditions are to be conſidered as they ſtood at the time of the teſtator's death. Now to apply another of my Lord *Hardwicke*'s obſervations to this caſe, "The implication," ſays his lordſhip, "to raiſe ſuch a condition ought to be a neceſſary implication, ſomething as ſtrong as if written in the will." Suppoſe then the teſtator to riſe from the dead to expound his own will, and to be aſked, Did you mean that, if *Johnſton* and *Alexander* did not ſubmit to take the remainder limited to them of the ſettled eſtate, ſubject to the charge of 1000*l.* for the daughters, they ſhould be deſtitute of any immediate proviſion under your will, and taking their chance for the death of *James* without iſſue, go and beg in the mean time? Surely, he would anſwer that he never meant it; that he never intended to purchaſe the chance of 1000*l.* for his daughters upon the ſettled eſtate, upon an event which might never happen, at the hazard of ruin to two ſons, who ſeem to be equally objects of favour with thoſe daughters. The condition is, therefore, ſo far from being neceſſary, ſo far from being written in the will, that without it, it is a juſt, reaſonable will, and ſubject to it would be the moſt unjuſt of all wills. Therefore the bill ſo far as it ſeeks this additional ſum of 1000*l.* to be raiſed by ſale or mortgage of a competent part of the ſettled eſtate ought to be diſmiſſed. But it being clear that the plaintiffs are intitled to the other ſums, the directions of the will as to them muſt be carried into execution.

Barons *Hamilton* and *Metge* expreſſed their concurrence. Baron *Power*, who was abſent when

when the opinion of the Court was delivered, having gone abroad for the benefit of his health, had ſignified his agreement before his departure. Stewart & al.' *againſt* Henry & al.'

END of MICHAELMAS TERM, 1786.

MEMORANDUM. Mr. Juſtice *Robinſon*, firſt puiſne judge of the court of King's Bench, died on the 16th of *January*, 1787, at his houſe in *Dominick-ſtreet*. He took his ſeat on the bench in *Trinity term*, 1757.

HILARY

Hilary Term

27 Geo. III. 1787.

In the Exchequer.

Tueſday Jan. 23.
Scot v. M'Anally.

The duplicate, purſuant to 25 Geo. 3. c. 46. (the inſolvent debtors act) unleſs ſomething on the face of it impeach it, is concluſive to free the inſolvent from arreſt for a prior debt; but it appearing to have been obtained by forgery, the court will give time to have it ſet aſide.

SCOT *againſt* M'ANALLY.

MR. *EGAN* moved to have the defendant diſcharged from an arreſt, for a debt ſworn to have been due by him, before he had taken the benefit of the inſolvent debtors act, 25 *Geo.* 3. *c.* 46. He relied on the duplicate of the order of diſcharge, being concluſive evidence for this purpoſe: and on Mr. *Huband contra* objecting that the diſcharge had been fraudulently obtained, *Yelverton*, Lord Chief Baron, ſaid that the court could not examine whether the defendant had been duly and fairly diſcharged under the inſolvent debtors act: that the duplicate, whilſt it ſtood, was concluſive evidence, unleſs ſomething appeared upon the face of it to impeach it. If it has been fraudulently obtained, you muſt apply to the court which granted it, to ſet it aſide.

However

However, a certificate of the conviction of an attorney for forgery, in procuring for the defendant the benefit of the act, having been read, the court (*Yelverton*, Lord Chief Baron, and Baron *Hamilton*) ordered the motion to ſtand over for a week, that in the mean time an application might be made to ſet aſide the duplicate; obſerving, that though it was not itſelf forged, yet it was grounded on forgery. Scot *v.* M'Anally.

N. No application was made to ſet it aſide; the plaintiff being unwilling to go to further expence, as the other creditors refuſed to join in it: the defendant therefore was afterwards diſcharged on a common appearance, without any oppoſition.

JOHN WATKINS, Aminiſtrator of BARCLAY WATKINS, Plaintiff.—DORCAS WATKINS and HENRY PEARD, executors of WESTROP WATKINS, ANNE BARCLAY and WILLIAM VOWEL, Defendants, in the original Cauſe. Thurſday, Jan. 25. Watkins *againſt* Watkins.

DORCAS WATKINS, HEN. PEARD, Executors of W. WATKINS, Plaintiffs.——JOHN WATKINS, W. VOWEL, ANNE WATKINS, and ANNE BARCLAY, Defendants, in the croſs cauſe.

A MARRIAGE being intended between *Weſtrop Watkins* (father of the plaintiff *John*) and *Mary Barclay*; a deed of ſettlement was By marriage ſettlement the husband's family eſtate is ſettled in the uſual mode—it is covenanted with the huſband, that the wife's portion 1500l. ſhall be paid to truſtees to provide for the daughters and younger ſons after his death, in equal ſhares, in default of an appointment

Watkins *againſt* Watkins.

was executed, bearing date 20th *Dec.* 1758, between *John Watkins* the father, *Anne* his wife, *Weſtrop W.* and *Iſaac W.* (*John's* ſecond ſon) of the firſt part—*Mary Barclay* and her father *David B.* of the ſecond part—and truſtees (of the ſurvivor of whom, *Anne Barclay*, is the perſonal repreſentative) of the third part—and thereby, in conſideration of 1500l. (the marriage portion of *Mary*) *John*, *Anne*, *Weſtrop* and *Iſaac*, conveyed certain lands of which *John* was ſeized in fee, and certain freehold intereſts, to the uſes of the marriage, in the ordinary courſe of ſettlements: part of the lands was thereby charged with 200l. to be paid to *John* the father, and *David Barclay* covenanted with *Weſtrop Watkins* to pay to the truſtees the ſum of 1500l. the marriage portion of his daughter, to be and remain in their hands, or the ſurvivor, his executors &c. as a fund to provide for the daughters and younger ſons of ſaid marriage after the death of *Weſtrop*, to be paid in ſuch ſhares and proportions as he by deed or will ſhould appoint, and in default of appointment to be divided equally amongſt ſuch daughters and younger ſons, to be paid to the ſons at twenty-one, to the daughters at twenty-one, or marriage. And it was provided, that if there ſhould be but one younger child, the ſum of 1000l. only ſhonld be applied as a proviſion for it, and

appointment by him. It is provided that in caſe of there being but one child it ſhall have 1000l. and the eldeſt ſon the other 500l. that a daughter being an only child ſhall have the whole. The huſband to have the intereſt for life, and a power of laying out the principal in a purchaſe of lands, in truſtees names, as a fund for the purpoſes aforeſaid. There is iſſue of the marriage two ſons, the elder of whom only ſurvives his father, and claims the 1500l. but he is decreed only 500l. (to which he is admitted to be intitled) for where a huſband makes a ſettlement, he is intitled to his wife's portion, unleſs it be otherwiſe provided, which in this event it was not. Where money is to be laid out on land as a more ſecure fund for certain purpoſes, it (and the land itſelf when purchaſed) is ſtill to be conſidered as money; and the heir can claim no benefit of it.

the

the remaining 500l. ſhould go to the eldeſt ſon of ſaid marriage; and that, if there ſhould be no ſon, and but one daughter, then the whole 1500l. ſhould go to ſuch only daughter. It was further covenanted that the truſtees ſhall permit and ſuffer the ſaid *Weſtrop Watkins* to receive the intereſt during his life, and alſo to lay out the ſaid ſum of 1500l. in a purchaſe of a perpetual intereſt in lands in the name of the truſtees or the ſurvivor of them, to remain as a fund to anſwer the proviſions before made for the ſaid daughters and younger ſons, in ſuch manner as before ſet forth. Watkins *againſt* Watkins.

The marriage was ſolemnized; and thereupon *D. Barclay* handed over ſecurities to the amount of the portion, covenanting to make good any deficiency that might ariſe in them.

John Watkins the elder died in 1766, whereupon the ſeveral eſtates beeame veſted in the poſſeſſion of *Weſtrop*, and ſo continued till the time of his death. *Weſtrop* had iſſue by *Mary* two ſons, *John* the plaintiff, and *Barclay*, who died in his father's lifetime, but after the death of his mother. *Weſtrop* afterwards married *Dorcas* one of the Defendants, by whom he had iſſue, and died 20th of *January*, 1783; leaving his wife and *Henry Peard* executors of his will. There was a brother of *Weſtrop*, named *John*, to whom the father by his will left but one ſhilling. After the father's death *Weſtrop* told *John* that his father had informed him of that circumſtance, and that on his (*Weſtrop*'s) expoſtulating with him thereon in favour of his brother, the deceaſed deſired him to pay to *John* the 200l. which he had the diſpoſal of under the ſettlement: but ſaid *Weſtrop*, I cannot ſafely pay it to you without a diſcharge from our brothers

Watkins *againſt* Watkins.

brothers and ſiſters, who are intitled to the reſidue of our father's perſonalty, under his will. *John* procured theſe diſcharges, and *Weſtrop* paid him the money, but at what time, did not appear in the cauſe.——In 1772 *Anne Watkins*, executrix of *John* the father, executed a conveyance of that charge of 200l. to *Vowel* in truſt for *Weſtrop*; the receipt of the money being acknowledged on the back of the aſſignment. After his marriage with *Dorcas*, *Weſtrop* called in 1150l. of the 1500l. with the conſent of the truſtees.

The prayer of the original bill was to be decreed to the whole ſum of 1500l. or ſuch part thereof as the court ſhould think plaintiff intitled to, to be paid by *Anne Barclay*, or the executors of *Weſtrop*, or ſuch of them as the court ſhould think liable. That the neceſſary accounts ſhould be taken; and that the perſons who ſhould appear to be intitled to the ſaid ſum of 200l. might be obliged to reſort to the perſonal eſtate of *Weſtrop Watkins*; and the plaintiff's eſtate be exonerated from that charge.

The croſs bill was filed by the executor of *Weſtrop Watkins*, to have that ſum of 200l. with intereſt, decreed a ſubſiſting charge upon the lands made ſubject to it by the ſettlement, and to be raiſed by ſale of a competent part thereof.

This caſe was argued, for the plaintiff in the original cauſe, by Mr. *Solicitor General*, Mr. *Curran*, Mr. *Finucane*, Mr. *Dickſon*, Mr. *Egan*, Mr. *Keller*, and Mr. *Rice*; and, for the executors of *W. Watkins*, by Mr. *Wolfe*.

For the plaintiff in the original cauſe. In this caſe three queſtions ariſe: 1. Whether the plaintiff

plaintiff is not intitled to the whole 1500l. with intereſt from the death of *Weſtrop Watkins*? Watkins *againſt* Watkins.

2. If not to the whole—whether he is not intitled to 500l.?

3. Whether the 200l. can be conſidered a ſubſiſting charge on the eſtate?

(Upon the firſt queſtion, it was argued by all the counſel for the plaintiff, except Mr. *Keller*, that by the words of the ſettlement, reſpecting the laying out of the 1500l. in a purchaſe of lands, it was *agreed* to be laid out ſo, and was therefore to be conſidered as land, to which the plaintiff would be intitled as heir, ſubject to the proviſion for younger children, according to the limitations which would have been decreed, had a bill been filed for a ſpecific performance; and they propoſed ſeveral modes of limiting the lands in ſuch caſe; but it is unneceſſary to follow them, on this ground, as the words do not expreſs ſuch an agreement, and even if they did, and land had been purchaſed in purſuance thereof, it muſt nevertheleſs have been conſidered as *money*, and the heir could have had no claim; (upon the authority of *Combe* and *Combe*, 2 *Atk.* 185. cited by Mr. *Keller*, where the diſtinction is taken between an original and primary intention of the parties to lay out money in land, and an agreement to lay it out on land, in order to make the fund for certain purpoſes, more permanent and ſecure.)—In the event that has happened the plaintiff is intitled to the whole ſum of 1500l. conſidering it as money. It was clearly intended as a proviſion for the children of the marriage; they are to be conſidered as purchaſers under the ſettlement; whereas if it is to be conſidered as veſted

Watkins *againſt* Watkins.

in *Weſtrop* the father, it will go amongſt ſtrangers to that ſettlement, and to *David Barclay*, from whom it was derived; namely, amongſt *Weſtrop*'s children by another venter. It was limited to the younger children, only in contradiſtinction to the eldeſt ſon; but in the event that has happened of there being no younger children, it could not have been intended that it ſhould go to ſtrangers, from the only ſon of that marriage. How can this money be conſidered as veſted in *Weſtrop*? He had no intereſt in the ſettled eſtate, to render him an object of remuneration: the whole flowed from his father *John*. It is not in any event whatſoever expreſsly given to him by the ſettlement; but he has the intereſt of it for life, and the power of diſtributing it amongſt his children, given to him in excluſion of all claim or title to the principal. The ſame intereſt, viz. for life only, is given to him in his wife's portion, and in the ſettled eſtate. Confining ourſelves to the deed itſelf, we can only collect the intent of the parties, in a caſe not provided for, by analogy to their intent declared in a caſe that is provided for. If there ſhould happen to be only one younger child, the eldeſt is expreſsly to take a part of his mother's portion; then if there ſhould be no younger child, we may fairly infer that it was intended that the only ſon ſhould take the whole. Will you ſay the portion ſhall go to the father, to whom no part of it is given by the deed in any event, in excluſion of the ſon who is expreſsly provided for in one event. Whether you give it to the father or to the ſon, your decree cannot be founded on the expreſs words of the ſettlement, but on the equitable inference from them. In whoſe

whoſe favour then is the implication ſtronger of the father or of the ſon? Watkins *againſt* Watkins.

This point may be conſidered in another light: the reſpective ſhares of the mother's portion may be conſidered as veſted in the children upon her death; the number of the iſſue of the marriage being then aſcertained. In that view the plaintiff is intitled to the whole; to 500l. in his own right, and to the reſidue as adminiſtrator of his brother *Barclay*.

But if the court ſhould be againſt us on this firſt queſtion, and think that we are not intitled to the whole; then we come to the ſecond: whether the plaintiff is not intitled to the ſum of 500l.? By the ſettlement, in caſe of there being but one younger child, the eldeſt was to have 500l. The event was that there was but one younger child, who died in the life-time of his father: had he ſurvived him the plaintiff would, by the words of the ſettlement, have been intitled to that ſum: ſhall he be in a worſe ſituation by the death of his younger brother in the life-time of his father? If he cannot have the whole, he is intitled at leaſt to 500l. of it.

As to the third queſtion: we contend that this cannot be held a ſubſiſting charge. There is no actual proof in the cauſe, of the payment of it to *Anne Watkins* in 1772, when ſhe made the aſſignment: but it is proved that *Weſtrop* had paid it to his brother, with whom he had the converſation in 1766, from which time to 1772, there was no act of his ſhewing an intent to keep the charge ſubſiſting againſt the eſtate. Where a tenant for life or in tail pays a charge affecting the eſtate; in order to keep

Watkins *againſt* Watkins.

it ſubſiſting for his own benefit, it muſt appear that ſuch was his intention, at the time of the payment; and his perſonal repreſentative claiming the charge muſt ſhew that circumſtance: it is true, ſuch an intent does appear by the aſſignment in 1772, but at that time there was no ſubſiſting charge: it had been paid off ſoon after the death of *John* the father; and this was a mere contrivance to revive it. The payment and the intent to keep the charge on foot, ought to be contemporary. There are no circumſtances at the time of the payment to ſhew that he had that intent; on the contrary, there are circumſtances to ſhew that he intended to clear the eſtate; and any evidence, the ſmalleſt circumſtances, will be ſufficient to prevent his perſonal repreſentatives from claiming it. *Jones* v. *Morgan. Erown. Cha. Caſ.* 206. He withheld the payment of it to his brother *John*, until he ſhould have procured diſcharges for it from their brothers and ſiſters who were intitled to it, under their father's will. The eſtate was ſettled on his own ſon: he had but one, and no other object to provide for by an increaſe of his perſonal property; it was, therefore, highly natural for him to wiſh to pay off the incumbrance entirely; afterwards, upon his ſubſequent marriage, it was natural for him to wiſh to ſet up the charge again, and to endeavour to give a new colour to the tranſaction: but it would be dangerous to ſuffer a father to make his ſon believe that he had diſcharged the eſtate ſettled on him, and then after ſeveral years had elapſed, to ſet up the incumbrance afreſh. Courts of equity will not ſuffer a father to revoke, upon a ſecond marriage, a be-

nefit before conferred on the children of the firſt. *Lucas* and *Lucas*, 1 *Atk.* 270. Watkins *againſt* Watkins,

Ch. Baron. The payment by *Weſtrop* made in purſuance of a verbal direction of *John* the elder, after his death, to *John* the younger, could, in truth, be no diſcharge of the incumbrance. *John* the elder's executrix might have called on the eſtate to pay it again; if ſhe could do ſo, ſhe might diſpoſe of it, which ſhe has done by the aſſignment to *Vowel*. Is a payment by *Weſtrop* to *John*, who is not the perſonal repreſentative, but a verbal nominee, a diſcharge of the eſtate? Could it paſs by that verbal direction of *John* the elder, to *John* the younger? Again: the converſation which *Weſtrop* had with his brother, was ſhortly after the father's death; but the time of the payment to him is not aſcertained. *Weſtrop* inſiſted on having previous diſcharges from the brothers and ſiſters: the procuring of theſe might have taken up ſome time, ſo that the payment to *John*, and the aſſignment in truſt by *Anne*, might have been done *uno flatu*. There appears no difficulty in this part of the caſe.

For the executors of *Weſtrop Watkins*. By the covenant *David Barclay* agreed to pay 1500l. the marriage portion of his daughter, to be veſted in truſtees for certain purpoſes, but without ſaying any thing of the intent of the parties in the particular event that has happened; ſo that that can only be collected from the ſubſequent declarations of the truſt, and the perſons from whom the conſideration flowed. The *Watkin*'s eſtate was ſettled in ſtrict ſettlement; of courſe there is a clear proviſion made for the eldeſt ſon. Afterwards comes the covenant for the payment

Watkins *againſt* Watkins.

payment of the 1500l. By adverting to the declaration of truſt there is an end of the arguments founded on conſidering the money, as having aſſumed the nature of land; if from the words of the covenant, it could be taken in that light, they might have ſome weight. *David Barclay* covenants and agrees with *Weſtrop Watkins*: (it is obſervable that the covenant is with *Weſtrop*, ſo that he has a beneficial intereſt, ſubject to certain proviſions) to pay the portion to truſtees, to remain "as a fund for the daughters and younger ſons, to be paid with intereſt," &c. (all along conſidering it as money) "in ſuch manner as *Weſtrop* ſhall by deed or will appoint, and in default of ſuch appointment, to the daughters and younger ſons, &c. throughout the whole ſettlement, regarding only the daughters and younger ſons. But as the eldeſt ſon, if there had been one younger, would have been intitled to 500l. I admit, that by the event of ſuch younger ſon having died, he ſhall not be deprived of it: it ſeems but right that he ſhould have it, and it would be unconſcionable to argue againſt it. It is hereafter to be conſidered out of what fund it ſhall be paid. But the ground upon which it is argued, that the plaintiff is intitled to the whole, is not maintainable: it is provided that *Weſtrop* may lay out the money, and that the truſtees ſhall permit him, in purchaſing a perpetual intereſt in land, in their names, to remain as a fund; for what? for the purpoſes of providing for younger children; it is not declared that it ſhall be laid out in land; the utmoſt that can be contended is, that *Weſtrop* had it in his power to do ſo, and then it would be merely a ſecurity for the money: as he did not make

make uſe of the power, it is evident he did not wiſh it ſhould be conſidered as land; but they want to make it a real eſtate againſt his will. The deed makes no proviſion for the event that has happened. The primary and great object of it was to provide for the younger children. There is indeed one exception to the general view of the ſettlement; that, if there be but one younger child, the eldeſt ſhall take 500l. had this been omitted, the whole tenor and ſcope of the deed would be to provide for daughters and younger ſons, and the plaintiff could claim no part of the money. The eldeſt ſon was already amply provided for by the ſettlement of the real eſtate; it was not therefore unreaſonable that if there ſhould be no more children, *Weſtrop* ſhould be allowed to make ſome proviſion for a ſubſequent marriage. There is no intent appearing on the face of the deed, which could raiſe an equity in favour of the eldeſt ſon; nor is there any thing expreſſed in the letter of it, but as to the 500l. Will you, becauſe in one particular event, he was to have a part; in another event that was not provided for, decree him the whole? As to the 200l. there can be no difficulty. It is evident the payment to *John* the younger, could not diſcharge the eſtate. If the repreſentative of *John* the elder, had the next day filed a bill for the money, the court would have decreed a ſale to pay it. It is a principle of courts of equity, where a payment of a charge affecting lands has been made by tenant for life, to conſider the charge as ſtill ſubſiſting for his benefit, and not paid by him in exoneration of the eſtate, unleſs it can be ſhewn that ſuch was his intention, and the proof of this lies upon him that claims

Watkins *againſt* Watkins.

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Watkins *againſt* Watkins.

the eſtate free from the charge, *Brown Cha. Cas.* 206. * Here there is no evidence of ſuch an intention in *Weſtrop*, and therefore it muſt go to his perſonal repreſentatives.

Yelverton, Lord Chief Baron.—In this caſe two queſtions ariſe, one reſpecting 1500*l.* which was the marriage portion of *Mary*, the mother of *John Watkins* the plaintiff; the other reſpecting 200*l.* charged on part of the lands compriſed in the ſettlement for the uſe of *John Watkins*, the firſt of that name. The caſe was this; *John Watkins*, the elder, being ſeized in fee of the lands of *Oldcourt*, and certain other lands, and having ſeveral freehold leaſes, had iſſue, *Weſtrop Watkins* his eldeſt ſon and heir, and ſeveral other children. In 1758, he treated for a marriage between his ſon *Weſtrop* and *Mary Barclay*. The marriage took place, but before it, a deed of ſettlement was executed, by which the lands of inheritance, and the freehold intereſts, were, in conſideration of 1500*l.* the portion of *Mary*, conveyed to truſtees in ſtrict ſettlement, ſubject to a charge of 200*l.* for the uſe of the father, *John Watkins*. As to the 1500*l.* (for there is no queſtion concerning the lands) there was a covenant to this effect. *David Barclay* covenanted with *Weſtrop Watkins*, to pay that ſum to the truſtees in truſt, to remain in their hands, as a fund to provide for the younger children of the marriage, after the death of *Weſtrop*; to be paid in ſuch proportions as *Weſtrop* ſhould appoint; and in default of his appointment (which could not happen

* The ſame point was determined by Lord Chancellor *Bathurſt*, in Lord *Egrement v.* the adminiſtrator of Lord *Thomond*. Vide *Butler's* Continuation of *Hargrave's Co. Lit.* 239, *b. n.* 3.

till

till after his death) to be paid in equal ſhares, to the ſons at twenty-one; to the daughters at twenty-one or marriage. And it was provided, that if there ſhould be only one younger child, 1000*l.* ſhould be paid to him, and the remainder to the eldeſt ſon; and if there ſhould be only one child, and that child a daughter, that the whole ſhould be paid to her. But as to what is to become of the 1500*l.* in the event that has happened, the ſettlement is ſilent, and has made no proviſion. The event was, that *Weſtrop* had two ſons, one of whom, the youngeſt, died after the death of his mother, and in the life-time of his father, and at the time of the father's death there was but one child, and that child a ſon. The queſtion then is, whether the plaintiff, who is that ſon, be intitled to any and what part of the marriage portion of his mother. Conſidering it merely as money, it has been argued in different lights; but it is impoſſible to ſupport his claim in any way conſiſtently with the ſettlement. One counſel ſays, the ſhares of the children veſted in them immediately on the death of the mother, becauſe then there could be no other children of the marriage. But ſee from the words of the ſettlement whether they can be conſidered as veſted then. The intereſt of the money is given to the father for life, but the portion itſelf veſted in the truſtees, there to remain until after his death, ſubject to his power of appointment, which could not be at an end before his death; conſequently it could not veſt before that time in the children. Another gentleman has cited a caſe to ſhew that it did not veſt. But even if an intereſt had veſted in *Barclay*, yet the plaintiff as his adminiſtrator could have no beneficial intereſt

Watkins *againſt* Watkins.

Watkins *againſt* Watkins.

intereſt in his ſhare; he could only take as truſtee for the executors of his father, who was entitled to the perſonal property of his ſon *Barclay*; therefore, we could not decree it to him. If it cannot be conſidered as veſted, how then is it to go to the eldeſt ſon of the marriage? It is not given to him by the words of the ſettlement. It muſt be then by ſome inference; which inference muſt ariſe from ſome known ſettled rule of law. What is the rule in ſuch caſes? it is that where a huſband makes a proviſion for the wife, her portion ſhall go to him, unleſs it is provided otherwiſe by the ſettlement; becauſe he pays the conſideration. Agreeably to that rule, if this ſettlement had been ſilent as to the 500*l.* going to the eldeſt ſon in the event of there being but one younger child, the whole muſt in the event that has happened have gone to the father, no part of it having been given away. Then why ſhall not that go to him, which was not given away? I think it muſt. In what caſes was it, or any part of it given away? If there had been ſeveral younger children, it was to have been divided amongſt them; if there had been only one child, and that a daughter, the whole of it was to have gone to her; if there had been only one younger child, 1000*l.* was to have gone to it, and 500*l.* to the elder. But if there be but one child, and that a ſon, is it given away? No; in that caſe it belongs to the father. But as to 500*l.* it is candidly admitted, that ſo much ſhall go to the plaintiff, becauſe it is thought but reaſonable that he ſhould take as much when there is no younger ſon as he would have done if there had been but one. I therefore think, that 500*l.* ſhould go to the plaintiff in the original

ginal cauſe, and the remaining 1000*l.* to the perſonal repreſentative of the father. Watkins *againſt* Watkins.

But it is ſaid there is another way by which the plaintiff is intitled to the whole of the 1500*l.* namely, as heir to his father; for that it is covenanted, ſay they, that the money ſhall be laid out in land, and that a court of equity will decree it to go, as if it had been actually laid out in the purchaſe of lands. But is that ſupported by the words of the covenant? The covenant ſays, that the father is to have the intereſt of the money during his life, and if he pleaſe, he may lay out the principal, and the truſtees ſhall permit him, in the purchaſe of lands in the name of the truſtees, to be and remain as a fund to anſwer the proviſions for younger children, before mentioned. Is it to be laid out in land for the benefit of the father, to go as lands of inheritance? No: but it is to be a fund for the benefit of younger children. Therefore the benefit of ſuch purchaſe muſt have gone to the younger children. Upon the authority of the caſe cited by Mr. *Keller*; they, and they only, would be intitled to the lands; the plaintiff could have no claim to them as heir; much leſs can he, ſince the portion has remained in money.

As to the other queſtion, concerning the charge of 200*l.* *John* the younger has ſworn, that *Weſtrop* did pay it to him, but at what time, it does not appear; but it does appear, that in 1772, *Weſtrop* procured an aſſignment of it from the widow and perſonal repreſentative of his father, to a truſtee for the expreſs purpoſe of keeping on foot that charge. It is ſaid, that where a tenant for life, pays a charge upon the eſtate, it ſhall be intended that he meant

Watkins *againſt* Watkins.

meant to keep it on foot for his own benefit; but, ſays Mr. *Finucane*, the ſmalleſt circumſtances (and he has put it much better than the book cited, which affects to lay down different degrees of *demonſtration*) will be ſufficient to ſhew, that he meant to diſcharge the eſtate. Where are the circumſtances in this caſe, that ſhew he intended to do ſo? The only circumſtance concerning it, is the aſſignment in truſt; that is the only thing we have to reſort to, and that ſhews directly the contrary It is ſaid, that it does not appear that the money was paid to *Anne Watkins*. It does not ſignify whether it was or not; ſhe might have diſpoſed of the charge as ſhe pleaſed, and given it to *Weſtrop*, *gratis*. But the receipt on the back of the aſſignment ſhews, as between them, that it was paid. That queſtion could only ariſe between her and the repreſentatives of *Weſtrop*: but ſhe doe not claim it; ſhe is contented, that it ſhould go to them.

The decree, therefore, muſt be, in the croſs cauſe, that the 200*l.* remains a ſubſiſting charge upon the eſtate; and in the original cauſe, that 500*l.* (becauſe admitted) ſhall go to the plaintiff, and the officer muſt take an account of the truſt money; that we may be enabled to decree out of what fund that ſum ſhall be paid.

Hamilton, Baron.—I agree with my Lord Ch. Baron in every point. I cannot forbear obſerving, that this caſe has been put in as many different lights, as perhaps any caſe ever was; and though that may ſhew the ingenuity of counſel, it certainly does not do any good to the cauſe. The gentlemen who inſiſt, that this 1500*l.* muſt be conſidered as land, ſeem to give up

up the queſtion, if it is to be taken as money. But there is no ground for conſidering it as land; it was optional in *Weſtrop* to lay it out on land or not; and if it had been laid out in land, there is no pretence to ſay, it ſhould deſcend to the heir. It was only to better the ſecurity, and muſt have followed the nature of money. As to the 200*l.* *Weſtrop* took every precaution he poſſibly could, to keep the charge on foot.

Watkins *againſt* Watkins.

Power, Baron, did not deliver any opinion, not having been preſent during the whole of the argument.—*Metge*, Baron, was abſent whilſt this cauſe was before the court.

A

Lockwood againſt Cox, Executor of Cox, Archbiſhop of Cashell.

Friday, Jan. 26.

Lockwood *v.* Cox.

Rule limiting the time for moving for new trials diſpenſed with.

THIS was a motion that had been firſt brought on laſt Tueſday (the firſt day of Term) by Mr. Solicitor General, to ſet aſide a verdict for the plaintiff, at the laſt ſummer aſſizes at *Clonmel*. To the objection that this motion ought to have been made laſt term, according to the rule of the court, and was now too late; it was anſwered, The plaintiff had not brought in the *Poſtea* (which muſt be done before this motion could be made in this court) until the laſt day but one of that term, and before the expiration of the four day rule then ſerved, we make this motion to ſet aſide the verdict. Beſides, the defendant at law had filed a bill for an injunction, and an order was made to ſtop after verdict; and a court of law will take notice of the proceedings of a court of

Lockwood v. Cox.

of equity. The rule now objected is a new one, and ſeems not to have been underſtood by the practiſers; and our non-compliance with it has been occaſioned by the plaintiff himſelf; for on the 8th *November*, he ſerved us with notice of a motion in Chancery, for leave to proceed at law upon the verdict; the object of which, being for his advantage, we thought it unneceſſary to put a quickening rule upon him to bring in the *Poſtea*. He neglected making the motion in Chancery, until after the expiration of the term; but in the interim brought in the *Poſtea*, but ſo late that we could not move to ſet aſide the verdict laſt term. For the motion, Mr. *Solicitor General*, and Mr. *Sankey*——Againſt it, Serjeant *Toler* and Mr. *Egan* inſiſted that the rule was deciſively againſt this motion, for it expreſsly declares that ſuch motions ſhall be made within the term next after the verdict obtained, and the party obtaining it may be compelled to bring in the *poſtea* in time.* The order of Chancery to ſtop after verdict, is no reaſon for not obſerving the rule; (and of that opinion ſeemed the Chief Baron, who declared that a verdict mentioned in ſuch an order, meant an unim-

* The rule mentioned was made 27th *June*, 1786; it is this—"For the future every motion to ſet aſide a verdict or non-ſuit, ſhall be made within the term next after ſuch verdict or non-ſuit ſhall have been obtained. If the party obtaining ſuch verdict or non-ſuit, do not bring in the *poſtea* in due time, ſo as to enable the other party to make ſuch motion, he is at liberty to proceed in the uſual manner, to oblige the party obtaining ſuch verdict or non-ſuit, to bring in and move on the *poſtea*, within the time aforeſaid."—Note, the uſual manner above-mentioned, is by a rule to bring in the *poſtea* within two days, or the verdict, &c. to be ſet aſide.

peached

peached verdict, one that is acquieſced under.) Here they object to plaintiff's having brought in the *poſtea* ſo late: in Chancery, they attempted to attach him for bringing it in ſo ſoon. Lockwood v. Cox.

In reply the former reaſons were urged, and Mr. *Sankey* cited 4 *Bur.* 2271. *Doug.* 163. 766. to ſhew that the court would ſometimes diſpenſe with the rule, limiting the time for making ſuch motions.

Yelverton, Lord Chief Baron: It ſeems that both parties have lain under a miſtake: the beſt way will be to let the motion go on, that the merits may come before the court.

Power, B. The plaintiff ſeems to have been guilty of great mal-practice; on the 8th of *November* he ſerves a notice in Chancery, by which defendant is prevented from coming into this court, to move that plaintiff ſhould bring in the *poſtea*; and then without any motion made in Chancery he brings in the *poſtea*, but not till the laſt day but one of the term: I think they ſhould go into the motion.

Hamilton, B. of the ſame opinion.

It appeared from the report of the Ch. B. before whom the cauſe was tried, that it was an action for wages during the time the plaintiff had lived with the Archbiſhop as his ſteward, and receiver of ſome rents immediately about *Caſhel*. The objection taken to the verdict, was that the damages, 480l. were exceſſive. This was the ſecond trial that had been had between the parties on this queſtion: upon the former the jury gave the plaintiff 460l. damages; the defendant moved for a new trial, and alſo in arreſt of judgment, there being no averment in the count on a *quantum meruit*, how much plaintiff deſerved to have: the parties then conſented

Lockwood v. Cox.

ſented to go to trial again. The exceſs of the preſent damages above the former, was accounted for by the diſcovery ſince the former trial, of an article in plaintiff's account, for which credit was given him at the laſt trial.

Power, B. The matter now reſts merely upon the queſtion of damages: that is the proper province of the jury to determine on; take the demand of the plaintiff, as ſet forth in the declaration, compared with the damages found by the jury, and can we ſay they are exceſſive?

Hamilton, B. The conſtitution has wiſely placed the ſcales for weighing damages in the hands of the jury, and we cannot take them out. What is done in thoſe caſes where, as the books ſay, the damages are outrageous? The caſe is ſent to a new jury for their verdict: that has been done here, and the ſecond jury has not only confirmed the verdict of the former, but given additional damages; which indeed has been accounted for: I do not think we can grant another trial.

Yelverton, Lord Ch. B. I lament extremely that the verdict cannot be ſet aſide; for it ſtruck me forceably on the trial, that the demand was unconſcionable.

Motion for a new trial refuſed.

N. When this was firſt moved, the Chief Baron ſaid, he had perfect recollection of the trial and evidence; and that he was very much diſſatisfied with the verdict. He wiſhed therefore that the motion ſhould ſtand over, for the court to conſider whether the rule could be diſpenſed with.

Lord

Lord MIDDLETON againſt the Executors of BARRY.

Same day. Middleton *againſt* executors of Barry.

THIS was a motion to ſet aſide the verdict, which had been found for the plaintiff; and alſo a motion in arreſt of judgment, ſupported by Mr. *Curran*, Mr. *Bennett*, and Mr. *Egan*. In debt for rent, the plaintiff declared for 130l. the reſidue of a year's rent, due the 1ſt of *May*, 1781, by teſtator, as aſſignee of a leaſe for 31 years, made to one *Webb*, at the yearly rent of 180l. Plea, *Nil Debet*. At the trial two points were made: Firſt, that a payment of 180l. which the defendants had made in 1784, "on account, and as towards paying part of the arrear due by teſtator," as was ſpecified by the receipt produced, muſt be applied to and over-reached the demand in the declaration. Secondly, That *Barry* was a papiſt, and therefore the aſſignment to him void by 1 *An. c.* 32. the lands demiſed being part of the forfeited lands of *Ireland*, in proof of which the anſwer of plaintiff to an injunction bill, filed againſt him by the defendants, was read, in which he admitted that he believed they had been forfeited.

Payment made on account of rent generally, jury muſt determine to what period it is to be applied. 1 *An. c.* 32. which makes void leaſes and aſſignments thereof to papiſts, of forfeited lands, relates to thoſe forfeited in 1688. Debt for 130l. the reſidue of a year's rent of 180l. without ſaying the other part was ſatisfied, good after verdict.

Mr. *Serjeant Toler*, before whom the cauſe was tried, left it to the jury to determine to what period that payment was to be applied. The ſecond point was ſaved.

Thoſe objections were now urged, and in arreſt of judgment it was contended, that plaintiff's having declared for a ſum that appeared on the face of the declaration to be but part of an entire demand, without acknowledging on

Middleton *againſt* executors of Barry.

the record that the reſt had been ſatisfied, was an incorrigible defect, and therefore not cured by verdict.

As to the firſt point, the court entirely agreed with the learned Serjeant. Upon the ſecond, the court held that the act of *Anne* only related to the forfeited eſtates in 1688. In ſupport of the other objection were cited *Cro. Car.* 137. 436. 3 *Mod.* 41. 2 *Lev.* 4. 2 *Vent.* 129.

Yelverton, Ch. B. After verdict it muſt be intended that it was ſhewn on the trial, that the reſt of the rent had been paid. To have taken advantage of this objection, you ought to have demurred; beſides, I think the word *reſidue*, is a ſufficient acknowledgment on the record, that the other part was paid.

Motions refuſed.

Same day.

The King *againſt* ———.

The commiſſioners of appeal are competent to decide whether there has been a regular trial before the ſub-commiſſioners of Exciſe.

The KING, on the Information of ROGER COLEMAN, againſt ———.

MR. *Attorney General* ſhewed cauſe why a prohibition ſhould not go to the ſub-commiſſioners of the county of *Corke*. An information upon the Hovering Act had been tried before the ſub-commiſſioners, who proceeded to acquit the ſhip: but the ſentence being ſigned only by two ſub-commiſſioners, and therefore conſidered as a nullity, the trial was brought on again, when the former ſentence of acquittal was relied on as a bar, and was allowed by the ſub-commiſſioners; but upon an appeal,

The King *againſt*

appeal, the Commiſſioners of Appeal remanded the information to be tried, upon which this motion for a prohibition has been made; and it ariſes from not making the proper diſtinction between what is the ſubject of *appeal*, and what of *prohibition*: this the law has clearly defined: the *abuſe* of juriſdiction is the ground of *appeal*; the *want* of it, of *prohibition*. This is a matter within the juriſdiction of the commiſſioners. The acquittal was either good or bad; if good, *trover* would lie for the ſhip; if bad, the ſub-commiſſioners are right in proceeding to trial.

Mr. *Bennet*, *contra*. Three ſub-commiſſioners ſat at the trial, though only two ſigned the ſentence. I hope to ſhew that it is not neceſſary in any caſe, that a judge ſhould ſign his adjudication; at leaſt, not in the caſe of ſub-commiſſioners. As the preſent caſe is circumſtanced, the ſub-commiſſioners are obliged to over-rule our defence of *auter fois acquit*, which is a conſtitutional common law defence. A deciſion on the merits is final unleſs ſet aſide. 2 *Blac.* 827. 3 *Wils.* 304. for *Nemo debet bis vexari*. If an inferior court proceed to deprive a party of a common law right, a prohibition ſhall go. 2 *Roll. ab.* 302. A prohibition lies to the commiſſioners of apppeal, where they proceed improperly. *Breedon. v. Gill.* 1 Ld. *Ray.* 219. *Salk.* 555. 5 *Mod.* 269. S. C.

Yelverton, Ch. B. Were not the commiſſioners of appeal a competent court to decide whether the trial before the ſub-commiſſioners had heen regular? If they are competent, we cannot interfere in their determination.

Prohibition refuſed.

Saturday, Jan. 27. Brian *againſt* Brian.

ARTHUR and WILLIAM BRIAN againſt ROBERT BRIAN.

Demurrer to a bill of diſcovery, if plaintiff have a right to an anſwer to any part of his bill, demurrer is bad.

ROBERT BRIAN the defendant, had applied to one *Dennis* to lend him a ſum of money. *Dennis* gave him his promiſſory note, that he might raiſe money upon it. The defendant indorſed it; but was obliged to get the plaintiffs to indorſe it alſo, before he could get money for it. When it became due, the defendant could not pay it; and the plaintiffs were obliged to take it up.

This bill was filed to oblige the defendant to acknowledge, that the plaintiffs were only ſecurities for him; in order to ſupply evidence in an action, which the plaintiffs have brought againſt the defendant on the indorſement, with other common counts. The prayer of the bill is, that defendant may produce to the plaintiffs all books of accounts, writings, memorandums, &c. between him and *Dennis*; and that he may ſet forth by whom executed, and on what account. Defendant demurred to the whole diſcovery ſought by the bill; for that the indorſement, and payment of the money, may be proved without the aſſiſtance of a court of equity.

Mr. *Wallis* in ſupport of the demurrer.—— The bill is not merely for a neceſſary diſcovery, but extends to a variety of other matters, which are totally irrelevant, and may be hereafter made an improper uſe of.

Yelverton, Chief Baron.—You have demurred to the whole diſcovery. If there be any one charge in the bill which ought to be anſwered; the demurrer framed as it is, muſt be overruled:

ruled: for a *demurrer* cannot be bad in part, and good in part, as a *plea* may be. It is ſaid, that this is a common commercial tranſaction; where one indorſer ſues another. If it were ſo, the plaintiffs would have given the money to the defendant on his indorſement, and the plaintiffs would have indorſed it over; but that is not the caſe. *Dennis* gives the note to enable the defendant to raiſe the money, merely as an accommodation note, and the plaintiffs give him the credit of their names, knowing that it was the debt of the defendant, and that they were not to reſort to the drawer. The defendant, who is the firſt indorſer, gets the money for the note inſtead of the laſt, which would have been the caſe, if it had been an ordinary tranſaction. The bill is for a diſcovery, whether this is not the proper debt of the defendant, and whether this is not the nature of the tranſaction.

Brian *againſt* Brian.

This diſcovery the plaintiffs are entitled to, conſequently the demurrer being to the whole bill muſt be over-ruled.

Demurrer over-ruled.

ROTH againſt BUTLER, and another.

Saturday, Jan. 27.

Roth *againſt* Butler & al.

Demurrer for charging ſeveral matters againſt ſeveral defendants muſt deny combination, tho' the bill charge it only formally.

DEMURRER by the defendant *Butler*, for that the bill charges ſeveral and diſtinct matters againſt ſeveral defendants, with which the defendant *Butler*, is no way concerned.

Mr. *Downes* in ſupport of the demurrer.

Serjeant

Roth *againſt* Butler & al.'

Serjeant *Fitzgerald*, *contra*.—All demurrers of this kind muſt conclude with a denial of combination, 1 *Vern.* 416, 463. *Hind.* 157, and though the facts do not amount to a combination, if it be generally charged, it muſt be denied.

Yelverton, Chief Baron.—It is a ſettled point, that in ſuch demurrers you muſt deny combination, even though the charge be general and only for form. The objection is deciſive, though the bill warrants a demurrer, for it contains matter in which the defendant is not at all concerned.

Power, Baron.—The caſe before the court is the very exception to the general rule. Wherever the defendant pleads in bar, or demurs to the whole diſcovery, if he anſwer any part of the bill he over-rules the demurrer. The only exception is where the demurrer is; for that the bill charges ſeveral and diſtinct matters againſt ſeveral defendants; then, in order to ſupport the demurrer, you muſt deny combination, for though the defendants have different intereſts, they may enter into a combination to the prejudice of the plaintiff: they therefore muſt deny it.

Demurrer over-ruled.

But as the court thought there was good ground of demurrer, they gave defendant leave to anſwer, or plead, and demur, but not to demur alone.

WINDYS againſt BRANINGEN, and the Executors of LELAND.

Saturday, 3d Feb. Windys *againſt* Braningen and others. Order intitled, as in a cauſe which is not in court, ſet aſide.

MR. *Blackburn* moved, to ſet aſide an order to amend (and the amended bill) as made in a cauſe not in court. A bill had been filed againſt *Braningen* and *Leland*, and afterwards the plaintiff hearing that *Leland* was dead, filed a bill of revivor againſt his executors. They came in and pleaded, that the bill ought not to be revived againſt them, for that *Leland* was dead at the time of filing the original bill. The plea was allowed, and the plaintiff's agent obtained leave to amend the original bill, but the order was drawn up as in the cauſe of *Wyndys againſt Braningen and the Executors of Leland.*——*N.* This was a bill of diſcovery on the popery laws.

Per Curiam. No doubt the order muſt be ſet aſide as irregular, for by the allowance of the plea, the cauſe againſt the executors of *Leland* was out of court, and the amended bill founded upon the order muſt alſo be ſet aſide.

Order and bill ſet aſide.

MORGAN againſt COSGRAVE.

Tueſday, 8th Feb. Morgan *againſt* Coſgrave. Under 6 G. c. 6. a poſitive affidavit of a debt is neceſſary to hold a perſon to bail, except in the caſe of executors, &c.

MR. *M. Smith*, on ſhewing cauſe for holding defendant to bail obſerved, that the act of 6 *Geo.* c. 6. in this country differed materially from that in *England*, and does not require a poſitive affidavit. In *Pomp.* v. *Ludvigſon*, 2 *Bur.* 655. Lord *Mansfield*, and Mr.

Morgan *againſt* Coſgrave.

Mr. Juſtice *Forſter* ſaid, the rule there was too ſtrict; but they conſidered themſelves bound by the words of the act.

Yelverton, Chief Baron.—The conſtruction of the act has always been, that a poſitive allegation of the debt is neceſſary, except in the caſe of executors, and ſome others.

Thurſday 8th Feb. Ingham *againſt* Carſon.

Executor pleads a judgment and *nul aſſets ultra*, to an action of *debt* on bond. Replication *aſſets ultra*. Iſſue thereon. The judgment covers aſſets to the amount of the *penalty*.

Ingham againſt Carson, Adminiſtratrix of Kennedy.

DEBT on a bond. Defendant pleaded *plene adminiſtravit*, and 2dly, a judgment outſtanding for 58*l.* and 2*l.* 14*s.* coſts, with an averment, that it was for a juſt debt of 29*l.* and that ſhe had but 5*l.* to pay it, and *nul aſſets ultra*. The plaintiff replied ſeverally to the pleas, 1ſt. That defendant had not fully adminiſtred, 2dly, That ſhe had aſſets beſides, and above what would ſatisfy the judgment.

On the trial, the plaintiff proved that aſſets came to the hands of the adminiſtratrix, to the amount of 81*l.* 18*s.* 1½*d.* The defendant proved, that ſhe had expended 33*l.* 17. 10*d.* in diſcharge of debts of an equal, or ſuperior degree to the plaintiff's.

The judge left it to the jury to conſider, what aſſets came to the hands of the defendant, what debts ſhe had paid, and how much remained juſtly due on the judgment. He ſaid, that he ſaw no reaſon to diſcredit the evidence of the plaintiff, that 81*l.* 18*s.* 1½*d.* had been received, and then after paying *the real debt due on the judgment* with the intereſt, there would

would remain in her hands 9*l.* 0*s.* 2½*d.* and if they ſhould think there would be any reſidue they ſhould find for the plaintiff. The jury found for the defendant generally. A conditional rule had been obtained to ſet aſide the verdict. Mr. *Burſton* and Mr. *Jameſon* now ſhewed cauſe againſt it. Ingham *againſt* Carſon.

The verdict is found agreeably to the law on the facts appearing on the judge's report. The defendant has a right to cover aſſets to the amount of the whole judgment, unleſs the plaintiff reply, that the *conuſee* would accept of a leſs ſum, and that it was kept on foot *per fraudem*; if he do not reply ſo, the amount of the judgment muſt be taken to be the ſum due, *Bank of England* v. *Morrice*, 2 *Str.* 1028. Taking then the amount of the debts paid from the aſſets come to the hands of the adminiſtratrix, there remains 48*l.* 0*s.* 2½*d.* which is leſs than the judgment pleaded; ſo that if evidence had not been given, as to the money really due, the verdict muſt have been for the defendant. Then, ſurely the court will not ſet aſide a verdict, becauſe the judge was miſtaken; when the jury have, nevertheleſs, found according as they ought to have done if the judge had charged rightly; and when of courſe a verdict on another trial, muſt be the ſame as at preſent.

Yelverton, Chief Baron.—The iſſue joined in this caſe, was whether the defendant had aſſets in her hands beyond the judgment. But the trial proceeded, as if the iſſue had been, how much was really due on the foot of it. I do not ſay, but that might have been made the iſſue by ſpecial pleading. The plaintiff might have replied, that the *conuſee* would have

Ingham *againſt* Carſon.

have accepted ſo much, and that the judgment was kept on foot by fraud. But that was not the iſſue joined here, though it was the iſſue tried. I am not at all ſurprized, that the learned judge before whom this was tried, ſhould be led into error; though he is as little liable to it as any one; but the averment that 29*l.* was due to *Kennedy*, and the acquieſcence of counſel miſled him. The caſe cited from *Strange* is clearly in point, and it was decided ſince Stat. 4 & 5 *An.* c. 16. The pleading here is the ſame, as in that caſe: before it the rule was, that the amount of the judgment would cover the aſſets for ſo much; it was then endeavoured to ſhake that doctrine; but that caſe firmly eſtabliſhed it.

Power, Baron.—The report expreſsly ſtates, That evidence was given to ſhew what was really due on the judgment: that a copy of the judgment was given by conſent to the jury, in order to aſcertain the whole ſum due on the foot of the principal and intereſt, and that the judge did charge the jury to take that into conſideration, which he ought not to have admitted at all. Both ſides were under a miſtake, but the counſel for the verdict ſay, that if we ſet it aſide, it appears on the face of the report, that the next verdict muſt be the ſame; that I cannot ſee. We are not to preſume that the plaintiff could not give evidence of any more aſſets; for when the plaintiff had ſhewn aſſets, to the amount of 81*l.* 18*s.* 1½*d.* he conſidered himſelf entitled to a verdict. On a new trial he may give evidence of more aſſets than the judgment will cover, and then he muſt have a verdict. If we were to preſume that the next verdict would be the ſame

as

as the preſent, I do not think we ought to ſet it aſide, though the judge were miſtaken.

Ingham *againſt* Carſon.

Hamilton, Baron.—There is no getting over that caſe in *Strange*; the very point was put to the court upon a ſpecial verdict. *Lord Hardwicke* inclined to favor the confining of the judgment to what was juſtly due, in order to prevent the parties from going into equity, but it could not be done.

Metge, Baron.—I concur in opinion that the verdict ought to be ſet aſide. I think the iſſue joined, never was before the jury. It was, whether aſſets had come to the defendants hands, more than ſufficient to diſcharge the judgment, which was 58*l.* and not the debt juſtly due. In order to ſet aſide the verdict, we have no occaſion to reſort to the authority of any caſe. We muſt do it on the principle, that if the verdict be grounded on any but the proper iſſue, it cannot ſtand. The averment of the money due ſeems immaterial. From all the precedents I have ſeen, the iſſue ſhould be on the amount of the judgment. I ſee no reaſon for preſuming that the next verdict ſhould be the ſame as the preſent

Per Cur. Let the verdict be ſet aſide, but without coſts, as it ſeems that the judge and counſel on each ſide were under a miſtake.

MURPHY

Thurſday, Feb 8th. Murphy *againſt* Hoare.

Sheriff to pay 10 *per cent.* for with-holding money levied under execution, after demand, with *treble coſts.*

Murphy againſt Hoare.

A *FIERI FACIAS* having iſſued to the ſheriff of the county of *Wexford*, he returned goods to the amount of 105*l.* A *Venditioni exponas*, iſſued 13th *May*, returnable 23d *May*. On 17th of *June*, a fine *Niſi* was impoſed for want of a return. On 23d *June*, it was made abſolute, and he was attached. After *Trinity* term the ſheriff made his return, that he had ſold the goods to the amount of 105*l.* *July* 29th, the plaintiff empowered a perſon to receive the money for him. On the 1ſt *Auguſt*, the demand was made, and the ſheriff offered bills on *Dublin*; which the plaintiff refuſed to take. In *Michaelmas* term an order was made, that the ſheriff ſhould pay the plaintiff, the ſum of 105*l.* returned by him to have been levied under the *Venditioni exponas*, with intereſt for the ſame, at the rate of 10 *per cent. per an.* from 23d *May* laſt, and treble coſts; unleſs good cauſe be ſhewn to the contrary. This ſtood over from laſt term with liberty for the ſheriff to anſwer the affidavit on which this order had been founded, and to pay the 105*l.* The money was paid the 19th *December*.

Downes and *Hunt* ſhewed for cauſe, That the 19 & 20 G. 3. c. 38. ſect. 8. directs that "any ſheriff or ſub-ſheriff, who ſhall receive "any ſum by virtue of his office, for the "plaintiff, and with-hold it without reaſon-"able cauſe of ſuch neglect, one calendar "month *after requeſt*, ſhall pay ſuch plaintiff, "intereſt for ſuch ſum, at the rate of 10 *per* "*cent.* by the year, and treble coſts out of "pocket"

" pocket." No demand was made till the 1ſt of *Auguſt*, and then the ſheriff offered good bills on *Dublin*; if the court ſhould think that the ſheriff ought to pay the penalty at all after having offered thoſe bills, it can only be from the time the demand was made.

Murphy *againſt* Hoare.

Per curiam. This ſeems to be the firſt application on this ſtatute ſince it was made; it is very neceſſary that it ſhould be granted, that the ſheriffs may not think this ſtatute a dead letter.

Ordered that the ſheriff ſhall pay intereſt at the rate of 10 per cent. from the 1ſt of *Auguſt* to the 19th of *December*, and treble coſts.

HERDMAN againſt COWAN.

Friday, 9th February.

Herdman *againſt* Cowan.

Where there is a reaſonable doubt that juſtice has not been done, there ſhould be a new trial, that the matter may undergo the conſideration of a ſecond jury.

MOTION to ſet aſide the verdict as againſt evidence. This was an action againſt an under-writer, upon a policy of inſurance, on goods ſhipped on board a veſſel, called the *New York*, bound from *Greenock* to *New York*. It was tried laſt ſummer aſſizes at *Carrickfergus*, before Mr. Baron *Hamilton*. Verdict for the plaintiff. Upon the report it appeared that the value and quantity of goods had been proved; and that they had been ſhipped aboard the veſſel at *Greenock*: the only queſtion now before the court was, whether there was ſufficient evidence of the loſs.

As to that the Evidence was, that the veſſel had been for ſeveral years conſtantly employed in trading from *Greenock* to *New York*; that ſhe

Herdman *againſt* Cowan.

ſhe uſually made the voyage in nine months; that ſhe ſailed in *July* 1783, with the plaintiff's goods aboard; that ſhe had been ſeen falling down the river *Clyde*, but had not been ſeen at ſea, and that her arrival at any port had not ſince been heard of. A copy of the proteſt, entered at *New York*, of the loſs of the veſſel, had been offered, but rejected.

On croſs examing *J. Herdman*, the plaintiff's brother, it appeared that he had been ſet in the pillory at *Greenock*, for giving orders that the *Peggy*, a veſſel of which he was part owner ſhould be caſt away; and that *Archibald M'Cullum*, another part owner of the *Peggy*, and who was alſo one of the owners of the *New York*, had been ſet in the pillory for the ſame offence; that *Archibald M'Cullum* had been tried for giving ſimilar orders concerning the *New York*, but had been acquitted; that he had heard that the maſter of the veſſel was alive at *New York*. It was ſtated by the counſel and admitted, that one of the mariners had been in the keeping of the plaintiff for ſome time; but he was not produced on the trial. (The plaintiff now accounted for his abſence, by affidavit that he had had him ready at the former aſſizes if the trial had come on, but the defendant prevented it by not entering his appearance; that the plaintiff had offered him the ſame wages he could get aboard ſhip, but he would not ſtay.) It was inſiſted for the defendant, that the plaintiff ought to be nonſuited, for that he had failed in the proof of the loſs. The learned judge was at firſt of that opinion, but on reviewing his notes, he thought there was ſome degree of evidence to go to the jury; but he charged that the evidence of the loſs was inſufficient, and that ſeveral circumſtances had come out, which rendered it neceſſary

neceſſary that they ſhould have very clear evidence of the loſs. Herdman *againſt* Cowan.

Mr. *Dunn* againſt the motion. The report ſays that the judge thought there was evidence of the loſs to go to the jury. The jury conſiſted of merchants, who muſt have been competent to judge of matters of this nature. By the judge's charge, that the evidence was not, in his opinion, ſufficient, they were cautioned to weigh it ſcrupulouſly, and they found that the veſſel was loſt. In affairs of this kind, it is almoſt impoſſible to produce the beſt evidence. The owners of the goods have no communication whatever with the crew; and cannot be ſuppoſed to have them under their controul. But ſuppoſing we had produced one of the crew upon the trial; it might happen, that his evidence could not be admitted. The veſſel might have been loſt in an attempt of the crew to run away with her. Barratry is one of the events inſured againſt; but he could not have given evidence of the deviation, becauſe it would have ſubjected him to puniſhment. There is no caſe where it has been decided, that poſitive evidence of a loſs is neceſſary; but there is one where Lord *Mansfield*, in enumerating the ſeveral caſes in which an action for money had and received would lie, ſays, if the inſured have recovered from the under-writers for the loſs of a ſhip, and ſhe afterwards appear, this action will lie for them. 2 *Bur.* 1009. whence it is evident there is no need of actual proof of the loſs.

Mr. *Wolfe contra.* This is a queſtion of great importance to the commercial intereſt of this country. There now prevails a practice of defrauding under-writers, by inſuring goods put aboard a veſſel above their value, and then cauſing

Herdman *againſt* Cowan.

cauſing the ſhip to be caſt away. Our application is to ſet aſide this verdict as againſt evidence: but though the court ſhould not think that the verdict ought to have been for the defendant; yet it is ſuch a caſe as they muſt be of opinion will require a further inveſtigation to get at the truth. The poſitive evidence ceaſes after that of the veſſel having been ſeen falling down the river *Clyde*. There is no evidence of her having been ſeen at ſea, or of what became of her afterwards; there is not a tittle of evidence of the manner in which ſhe was loſt: ſhe certainly did not founder at ſea, for ſome of the mariners are ſtill living. There is no doubt, that where a ſhip has been in the courſe of trading from particular places for ſeveral years, and has been miſſing a length of time, and none of the crew ever heard of, the preſumption is, that ſhe has foundered at ſea; but there is no inſtance where it has ever been attempted to eſtabliſh the loſs of the ſhip, upon evidence of her not having returned to port; when ſome of the mariners were ſtill alive. If you ſhould not ſet aſide this verdict you will eſtabliſh this rule, that the mere non-return of a ſhip, ſhall be concluſive evidence of a loſs, and the under-writers will be conſtantly defrauded without any opportunity of detecting the cheat; for none of the crew will then ever be produced to give evidence of the loſs, and the only poſſible mode of coming at the truth, is by croſs examining ſuch as may be made witneſſes on the trial. A policy of inſurance is entirely a matter of good faith; the underwriter gives credit to the inſured; the ſhipper to the maſter. It is more reaſonable that the inſured

Herdman *againſt* Cowan.

inſured ſhould give evidence of the loſs, than that the under-writer ſhould give evidence to the contrary.

Yelverton, Ch. B. I am clear that my brother *Hamilton* was right in letting the evidence, ſuch as it was, go to the jury; and on this principle, that in all matters reſpecting foreign commercial tranſactions, the law allows of a weaker degree of evidence; as in foreign bills of exchange, the proteſt proves itſelf, but in inland bills of exchange, it is neceſſary to prove the act of the proteſt; ſo in commercial tranſactions, where hand-writing is to be proved, it is ſufficient for a witneſs to ſwear that he had a correſpondence with the perſon whoſe hand-writing is to be proved, if it concern foreign matters; but in all other caſes, the witneſs muſt ſwear that he has ſeen the party write, and knows the hand-writing. But I am of opinion that the fact of the loſs has not been ſufficiently inveſtigated. There was no evidence that the veſſel was ſeen at ſea: no poſitive proof of the loſs, tho' ſome of the mariners have ſurvived. In the caſe of *Bright* and *Eynon*, 1 *Bur.* 391. the principle laid down is, "that if there be a reaſonable doubt that juſtice has not been done, it is proper to have the cauſe more deliberately conſidered by another jury." Therefore, without giving any opinion whether the evidence was ſufficient or not, I think there ought to be a new trial; merely to aſcertain whether the goods were fairly loſt, and then it will be open to the defendant, to ſhew that the goods were relanded, if he have any evidence to that effect, as is ſuggeſted.

Herdman *againſt* Cowan.

Hamilton, B. I believe the counſel were led from my opinion of the inſufficiency of the evidence, not to go into the defendant's caſe

Power, B. It muſt be underſtood that this verdict is ſet aſide for the ſole purpoſe of inveſtigating the loſs; which it appears from the report, and from what my brother *Hamilton* ſays, was not ſufficiently gone into.

Verdict ſet aſide on payment of coſts, and admitting every thing the plaintiff requires, but the loſs of the goods; and the plaintiff to admit that the captain was alive at *New York*, and ſeveral of the crew elſewhere, at the time of the laſt trial.

Balfour *againſt* the caſual ejector.

Saturday Feb. 10.

An annuitant cannot take defence to an ejectment for the land out of which his annuity is payable.

Leſſee of BALFOUR againſt the caſual Ejector.

TO the Declaration in Ejectment, one *Young* had taken defence. Motion to ſet it aſide, as having been taken on the ground of his having an annuity out of the land. An affidavit was read, ſtating that beſides the annuity, the lands had been deviſed to *Young*, as a truſtee for certain purpoſes, and that the legal intereſt had veſted in him.

Per Cur. The defence muſt be ſet aſide, but *Young* muſt have permiſſion to take defence *de novo*, on the ground ſtated in the affidavit.

FLEETWOOD

FLEETWOOD against COPPERTHWAITE.

Fleetwood *againſt* Copperthwaite. Same day.

MR. *A. Stewart* moved to ſet aſide the plea of *Non aſſumpſit infra ſex annos*. Plaintiff had obtained judgment by default; but it had been ſet aſide on the terms of defendant's pleading iſſuably. He pleaded by leave of the court the general iſſue, and *non aſſumpſit infra ſex annos*.

When a regular judgment by default is ſet aſide upon the terms of pleading iſſuably The plea of the ſtatute of limitations, is not within thoſe terms.

Yelverton, Ch. B. *Non aſſumpſit infra ſex annos*, is certainly an iſſuable plea, but whenever proceedings are ſet aſide, on the terms of pleading iſſuably; this plea is not conſidered as ſuch within the terms required; the plea muſt be to the merits.

Plea ſet aſide.

EDWARDS againſt HARDING.

Same day. Edwards *againſt* Harding.

THIS was an action for making and publiſhing a certain libellous effigy, with a malicious intent to ſcandalize and expoſe the plaintiff, and cauſing the ſame to be carried about the ſtreets of *Doneraile*; with conſequential damages in plaintiff's being obliged to ſell his houſe and furniture there, and remove to another town. Verdict for plaintiff, damages 250l.

Want of ſummons to the jury not a cauſe of challenge to the array. Publiſhing a libel is evidence to go to a jury of the making. The making and publiſhing conſtitute but one offence.

In this caſe the court thought there was not a ſufficient ground to ſet the Verdict aſide for exceſſive damages.

Edwards *againſt* Harding.

Motion to ſet aſide the verdict, upon three grounds, 1ſt. Miſdirection of the judge to the triors upon a challenge to the array, for that, the jurors were not duly ſummoned. 2. That the verdict was againſt Law and evidence. 3. That the damages were outrageous.

With regard to the firſt objection—The jurors on the general pannel had been ſummoned by virtue of a *Diſtringas* in another cauſe, before the *Diſtringas* in this was put into the ſheriff's hands; on the receipt of this *Diſtringas* he ſerved ſummonſes on the jurors, but in them the defendant's Chriſtian name was miſtaken. Mr. Serjeant *Toler*, before whom the cauſe was tried, gave it as his opinion, that the jury having been ſummoned by virtue of a *Diſtringas* in the ſheriff's hands, his not having one in this cauſe at that time was no objection, if it be delivered to him time enough to have them ſummoned. The court now over-ruled the objection, and *Power* B. ſaid that it had been decided in *leſſee of Metge* v. *Coſtello*, in this court, that the want of ſummons was no objection between the parties; it was an omiſſion of the ſheriff, which would excuſe the jurors, had they not attended.

The evidence was, that on *Friday* the 3d of *October*, 1783, an effigy of the plaintiff had been carried about the ſtreets of *Doneraile:* that on *Sunday* the 5th, the defendant attended an effigy dreſſed like the plaintiff, and encouraged the mob to carry it to the plaintiff's houſe, and that the plaintiff had been obliged to change his reſidence. It was proved on the part of the defendant, that he had been in *Cork* for ſome time before the 5th of *October*, and remained there until late on *Saturday*

Edwards *againſt* Harding.

day night the 4th of *October*, that he had been indicted for the ſame offence, had been fined 50l. and lain in gaol three months. The judge was of opinion that there was legal evidence to ſupport the whole declaration. In ſupport of the ſecond objection, Mr. *Duquery*, Mr. *Bennet*, and Mr. *Emmet* contended that the evidence did not ſupport every part of the declaration, and that where entire damages are found, and on part of the charge in the declaration, there ought not to have been any, the verdict cannot ſtand, 1 Ld. *Ray*. 329. 2 *Black*. 790. In this laſt caſe, the judge had charged the jury not to give damages for that part of the declaration to which there had been no evidence, the jury found 5l. generally; from which, and the judge's charge, the court preſumed, that the jury found only for that part to which evidence had been given. In the preſent caſe the declaration is for *making* and *publiſhing*. There ought to have been evidence of both, or the judge ought to have charged the jury not to find damages for that which was not proved. There was no evidence that the defendant *made* the effigy; on the contrary, it was proved that the defendant had not been in *Doneraile*, for ſome time before the effigy was carried about at firſt, and of courſe could not have been the maker. (*Cur.* It does not appear that the effigy carried about on *Friday*, was the ſame with that carried about on *Sunday*.) By the declaration, the plaintiff has made the making of the effigy part of his caſe; it lay on him to prove it, but he has failed. The jury are bound to diſcharge themſelves of the whole declaration. *Cro. El.* 133. 306. 433. *Aleyn*. 35. here they have found defendant,

Edwards *againſt* Harding.

fendant guilty of the whole, though there was no evidence as to one part.

As to the third objection; an affidavit was read, that the jury conceived that Lord *Doneraile* was to pay the damages, otherwiſe they would not have found ſo much; and an affidavit of the defendant, that the damages were beyond his ability to pay, and if the verdict ſtood, he muſt remain in goal all the reſt of his life. It was argued, that where a jury find a verdict under a wrong impreſſion, it ought to be ſet aſide. The damages are diſproportioned to the injury, and to the abilities of the defendant. It is a principle laid down in *Magna Charta*. *Liber Homo non amercietur niſi ſecundum magnitudinem delicti, ſalvo contenemento ſuo.* Where exceſſive damages have been given, it is right to give an opportunity of reconſidering the verdict. 3 *Bur.* 1846. 1 *Stra.* 691. It is remarkable that the firſt inſtance, in the books, of a verdict's being ſet aſide, was for exceſſive damages. *Wood* v. *Gunſton*. *Styles* 466. Here the defendant had been already puniſhed by lying in goal for three months, and paying a fine of 50l. In *England*, when a criminal proſecution has been commenced, the *Attorney General* will grant a *Nolle Proſequi*, unleſs the proſecutor will undertake not to proceed civilly (*vide* the *King* v. *Fielding*. 2 *Bur.* 719.) That practice does not prevail here; yet his having been puniſhed criminally, ought to be conſidered in mitigation of damages.

Yelverton, Ch. B. As to the objection that there was no evidence that the defendant had made the effigy; he adopted it by the publiſhing and carrying it about. I think there was evidence to go to the jury, to ſupport the whole declaration,

declaration. With regard to the objection, that the damages are outrageous; after the caſe of *Wilford* v. *Berkeley*, 1 *Bur.* 609, where 500*l.* was found againſt a clerk in an office, during pleaſure, at a ſalary of 50*l.* a year, I cannot think theſe damages exceſſive, in a caſe where there is no other ſtandard whereby to meaſure them, than the feelings of the jury. Edwards *againſt* Harding.

Power, Baron.—As to the 2d objection; the Judge has reported, That he thought there was legal evidence to ſupport the whole declaration, and I concur with him in thinking that there was. As to the 3d. No doubt courts have juriſdiction to ſet aſide verdicts for outrageous damages. The only legal way the court has to meaſure the damages, is to compare them with the caſe made in the declaration. Compare theſe with the declaration, and ſo far are they from being outrageous, in my opinion, that if they had been double what they are, I ſhould not have thought that the verdict ought on that account to be ſet aſide.

Hamilton, Baron.—Of the ſame opinion, That there was ſufficient evidence of the whole declaration to go to the jury; and that the damages were not exceſſive.

Metge, Baron.—In the caſe cited from Lord *Raymond*, there was a feature which diſtinguiſhes it from the preſent. The offences were diſtinct, ſubſtantive offences. The action was for treſpaſs and falſe impriſonment; each part of which was an offence of itſelf. But here the making and publiſhing conſtitute but one offence. The making an effigy is in itſelf none; a man may make one in his cloſet for his

Edwards *againſt* Harding.

his own amuſement, it is the *publiſhing* that makes the offence.

Motion refuſed.

Monday Feb. 12th. Leſſee of Montgomery *againſt* the caſual ejector.

A perſon out of the kingdom taking defence to an ejectment, muſt give ſecurity for the coſts.

Leſſee of MONTGOMERY againſt the Caſual Ejector.

MOTION for liberty to take defence.—Counſel for plaintiff prayed, that the perſon on whoſe behalf the application was made might give ſecurity for the coſts; it appearing by the affidavit upon which the motion was grounded, that he was out of the kingdom.

Per Cur. Take liberty to take defence on giving the ſecurity required.

Exchequer

Exchequer. Equity Side.

Sittings after Term.

Executor of DAVIS againſt AYLMER & ux.' & al.'

Wedneſday 21 Feb. 1787. Executors of Davis *againſt* Aylmer and wife.

THE ſeparate anſwer of the huſband was ſet aſide, having been put in without the leave of the court. There was then a motion made, for leave to anſwer ſeparately, founded on an affidavit of a ſtranger, that he had heard and believed that the wife of the defendant was inſane.

Bill filed againſt huſband and wife. He cannot anſwer ſeparately, without leave of the court, and the huſband muſt make the affidavit, on which the application is grounded.

Per Cur. That is not ſufficient. The affidavit ought to have been made by the perſon applying for leave to anſwer ſeparately.

BARRY againſt DARRAN.

Same day. Barry *againſt* Darran.

MR. *Burſton*, on behalf of the ſerjeant at arms, ſhewed cauſe, why he ſhould not be obliged to bring in the body of defendant, purſuant to an order, which had been grounded on an affidavit, That defendant had been ſeen at large. The cauſe ſhewn was, that the Serjeant at Arms had offered, and was ready to aſſign the bail bond he had taken from defendant, or to ſue out execution thereon, which was all he had in his power to do; not having any place to confine his priſoners in.

Serjeant at Arms offers to aſſign the bail bond, or ſue execution on it. He is not bound to bring in the body.

Cauſe allowed.

WOOD-

Wedneſday, 21 Feb. Woodward *againſt* Ld. Stanhope

The anſwer of an Engliſh peer muſt be upon *oath*; unleſs plaintiff conſent to take it upon *honor*.

WOODWARD againſt LORD STANHOPE (an Engliſh Peer.)

A *DEDIMUS* directed to joint commiſſioners, had been ſued out, to take the defendant's anſwer *upon Honor*. The anſwer was taken by defendant's commiſſioners, thoſe named on the part of the plaintiff not having attended.

Mr. *Curran* now moved, on the part of the plaintiff, to ſet aſide the anſwer, it appearing not to have been taken upon oath: He obſerved, that this had been moved for before, but was ordered to ſtand over, that the practice in *England*, with reſpect to *Iriſh Peers*, might be enquired into.

Yelverton, Chief Baron.—I have ſeen the anſwer to the letter written for that purpoſe, and I find the rule is, that the anſwer muſt be taken upon *oath*; but that it frequently is taken upon *honor* by conſent. In this caſe, I think the plaintiff has conſented to take the anſwer upon *honor*. In future, the practice muſt be agreeable to that in *England*, with regard to *Iriſh* peers.

N. The Chief Baron was the only Baron in court this day.

Exe-

Executors of LE-HUNT againſt MURPHY.

Thurſday, Feb. 22. Executors of Le-Hunt *againſt* Murphy.

PLAINTIFF's bill had been retained for a year, during which an ejectment had been brought, and a verdict found for the plaintiff; but it was ſet aſide, and the cauſe was to go down for trial at the next aſſizes.

Bill retained for a year, means, that it ſhall be retained until the merits have been tried.

Sir *Fred. Flood* now moved, on behalf of the plaintiff, to enlarge the time for retaining the bill.

Yelverton, Chief Baron.—The plaintiff is entitled to have the time enlarged, and we will do it *toties quoties*, until the merits ſhall have been fairly tried; for that is the meaning and ſpirit of the order to retain for a year.

Cox, Adminiſtrator of Cox, Archbiſhop of CASHELL, againſt OSBORN.

Cox *againſt* Oſborne.

PER CUR. A conditional order to file a ſupplemental bill ſtating new matter diſcovered ſince the decree muſt ſpecify in it the new matter wanted to be put in iſſue.

The new matters which is to be the ſubject of a ſupplemental bill, after a decree, muſt be ſpecified in the conditional order.

RICE againſt RICE.

Rice *againſt* Rice.

THE matter in diſpute between the parties, had been referred to arbitration, and the ſum of 318*l.* 18*s.* had been awarded to be paid by the defendant, to the plaintiff.

Where a party impeaches an award, the court will not direct him to be paid any ſum under it.

Plaintiff

Rice *againſt* Rice

Plaintiff afterwards filed his bill for an account generally: againſt which the defendant, in his anſwer, inſiſted on the award, which he was ready to comply with. Mr. *Egan* now moved, That ſuch ſum, as the court ſhould think proper, ſhould be paid to the plaintiff for his neceſſary ſubſiſtence. The motion was grounded on an affidavit of plaintiff's diſtreſs; which affidavit alſo impeached the award, on the ground of miſcalculation. He contended that where it appears by the anſwer of defendant, that the plaintiff is entitled to ſomething, the court will always, upon application, order him a leſs ſum, than that admitted to be due, for his ſupport.

Yelverton, Chief Baron.—It has often been determined, That if a landlord file a bill, impeaching a leaſe; and the tenant by his anſwer, inſiſts upon the validity of it; the landlord is not entitled to the aſſiſtance of the court in obtaining the rent: That is analogous to the preſent caſe. You come here impeaching an award; and yet you want a ſum of money on the credit of it. The anſwer does not admit that any thing was due to the plaintiff.

Motion refuſed.

BROWN-

BROWNLOW againſt the Duke of CHANDOS, the Executors of MORLAND, and others.

Thurſday, Feb. 22. Brownlow *againſt* D. of Chandos and others.

Bill to revive and anſwer. Defendant attached upon non-appearance. Plaintiff may enter an order to revive in the ſame manner, as if the bill had prayed a *ſubpœna* to revive only.

MOTION on behalf of the executors of *Morland*, to ſet aſide the conditional decree for irregularity; inaſmuch as the bill of *revivor* prays a *ſubpœna* to revive and anſwer againſt them, and the defendants, the executors, having been ſerved, and not appearing, an attachment for want of appearance was entered, and thereon an order to revive.

Mr. *Coppinger* and Mr. *Duquery* contended in ſupport of the motion, That though a plaintiff might, if he pleaſed, revive without praying an anſwer; yet having prayed an anſwer, he has choſen his mode of proceedings, and cannot revive on an attachment for want of appearance, as he might have done, if he had prayed a *ſubpœna* to revive only. This was determined in this court in *Trinity* term, 1759, in the *Attorney General* againſt *Carden* and others, reported, 1 *Howard's Excheq. Eq.* p. 4. The plaintiff has made up his decree, as if the bill had been to revive only; and the decree itſelf, ſtates the proceedings which we complain of as irregular; and when the proceedings have been irregular, the court will ſet aſide the decree on motion, without putting the defendant to his bill of *review* and *reverſal*.

Fitzgerald, Serjeant, *contra*.—If this be an irregularity, they ſhould have made the objection when the order to revive was made; which was ſo long ago as the 3d of *May* 1785. There has never been notice to ſet aſide that order, and while it remains in force it

Browslow *againſt* D. of Chandos and others.

it is a bar; all the ſubſequent proceedings, are admitted to be regular. It is at the option of the plaintiff to pray a *ſubpœna* to anſwer as well as to revive; the anſwer is for his own benefit, and if he pleaſe he may waive it. The ſervice of the *ſubpœna* to hear judgment, as well as the order to revive, ſhews that the plaintiff did not inſiſt on the anſwer. This is merely an attempt to get rid of the coſts to be paid on ſetting aſide the conditional decree.

The motion ſtood over until next day, for the opinion of the court.

Yelverton, Chief Baron.—I am clearly of opinion, That the conditional decree cannot be ſet aſide for irregularity. It is agreed on both ſides, that the plaintiff may, if he pleaſe, waive an anſwer, and revive without it; then it ſtands as upon a bill to revive merely, without praying an anſwer. The queſtion is then, whether upon ſuch a bill, the plaintiff can revive upon an attachment for want of appearance? we are informed by the officer, that that is the uniform, ſettled practice; and it agrees with the caſe cited from *Howard*, if it be faithfully reported; and there is nothing to impeach it. This is a mere queſtion of coſts. If the decree be erroneous, the plaintiff takes it at his peril.

Motion refuſed with coſts.

ODEA

ODEA & *ux.*' Executrix of MARY GORMAN, againſt Lord MOUNTGARRET.

Thurſday, Feb. 22.

Odea & *ux.*' *againſt* Lord Mountgarret.

No caſe where a ſequeſtration may not be ſet aſide on terms; except where a third perſon may obtain a title in the mean time.

MARY GORMAN had filed her bill in *Auguſt*, 1782, and proceſs of contempt for want of appearance, had run to a ſequeſtration in *May*, 1784. In *July* following, ſhe died, leaving the plaintiff, *Mary Odea*, her executrix, who revived the bill; upon that alſo proceſs ran to a ſequeſtration, upon which ſhe obtained a decree. Mr. *Duquery* now moved, on behalf of the defendant, to ſet aſide the decree, and to allow him to put in his anſwer, upon payment of coſts.

Yelverton, Chief Baron. There is no caſe whatever, where a decree on ſequeſtration may not be ſet aſide, and the defendant let in to anſwer upon ſome terms; except where a title may accrue to a third perſon in the mean-time: as where a Proteſtant diſcoveror has obtained a decree upon ſequeſtration; there the court refuſes to ſet it aſide, becauſe another diſcoveror may ſtart up in the mean time.

CONRAN againſt BARRY and others.

Same day.

Conran *againſt* Barry.

After purchaſer had been in poſſeſſion, the ſale opened, upon a higher bidder being found.

A SALE had been made under a decree in this cauſe. *Ormſby* was declared purchaſer, and was put into poſſeſſion, and the conveyance to him executed and regiſtered. A motion

The preſent purchaſer, not allowed to pay the additional ſum, without ſetting up the eſtate again to ſale.

Conran *againſt* Barry.

A motion had been made to ſet aſide the ſale, another perſon having offered 200*l.* more than *Ormſby* had paid. It was now moved, that the preſent purchaſer ſhould be allowed to pay that additional ſum, without having the eſtate ſet up again.

Telverton, Chief Baron.—It is likely from this competition, That the eſtate will riſe conſiderably. It is juſt that it ſhould be ſet up again for the ſake of the creditors, as well as the defendant. I remember a caſe in Chancery, of a Mr. *Puxley*, where the ſale was ſet aſide upon motion after the purchaſer, a creditor, had been in poſſeſſion for a year or two; but it was on payment of all his coſts and expences, as well as his debt.

Ordered, That the lands be ſet up again; but *Ormſby* to be paid his principal, intereſt, and coſts out of pocket; to be aſcertained by his own affidavit.

Friday, Feb. 23. Ld. Carbery *againſt* Manſell & al. Commiſſioners of perambulation, muſt make return. If they cannot agree on the bounds, they may report ſpecially.

Lord CARBERY a minor, by his next friend, againſt MANSELL and PLOMER.

IT had been decreed in this cauſe, That a commiſſion of perambulation ſhould iſſue to commiſſioners to be named by the parties; or, if they could not agree in the nomination, by the Chief Remembrancer. The parties did agree in the nomination of the commiſſioners; but the commiſſioners could not agree in their return to aſcertain the bounds.

Fitzgerald, Serjeant.—Moved for a new commiſſion, to be directed to ſuch commiſſioners, as

as the court ſhould think proper; in order to have the bounds of the parts, of the lands in the decree mentioned, to which the plaintiff and defendants are reſpectively entitled, aſcertained, purſuant to the ſaid decree.

Ld. Carbery *againſt* Manſell & al.'

Yelverton, Chief Baron.—If the commiſſioners ſhould not proceed and make a return, we will attach them. There muſt be a return, that we may ſee what has been done on the commiſſion. They may report ſpecially, if they pleaſe; but we cannot take notice of what they have done, 'till we have it from themſelves.

Ordered, That the commiſſioners make a return forthwith; or in default thereof, ſhew cauſe, why they ſhould not be attached.

KEOGH againſt WOOD and others.

Same day. Keogh *againſt* Wood & al.' Sale of an eſtate not ſet aſide but on an affidavit of a greater ſum offered.

FITZGERALD Serjeant ſhewed cauſe againſt an attachment for not executing a conveyance of the lands ſold under a decree, and at the ſame time moved to ſet aſide the ſale, on the ground of their having been ſold under value. The cauſe againſt the attachment was, that *Wood* had never been ſerved with the decree.

Per Curiam. The cauſe as to the attachment muſt be allowed, but without coſts; for the motion to ſet aſide the ſale muſt be refuſed, as there is no affidavit of a greater ſum having been offered, which the rule of the court requires.

Friday, Feb. 23.
Executrix of Steele *againſt* Steele.
Plaintiff named *executrix* in bill and *ſubpœna*, and *adminiſtratrix* in proceſs of contempt; it is irregular, but cured by notice of moving for time to anſwer.

Executrix of STEELE againſt STEELE.

MR. *Chamberlain* moved to ſet aſide proceedings, which had run to a commiſſion of rebellion, for irregularity. The irregularity complained of was, that in the proceſs, the plaintiff was named *adminiſtratrix*, and in the bill and *ſubpœna*, ſhe was called *executrix*.

Blackburn, contra. Defendant has waived the irregularity; for on 10th *February*, ſhe ſerved notice of a motion for time to anſwer.

Chamberlain ſaid, That part of the proceſs, *viz.* the commiſſion of rebellion had incurred ſince the notice for time to anſwer was ſerved.

Per Curiam. The notice of moving for time to anſwer, was certainly a waiver of the firſt irregularity: there muſt be leave to anſwer on the uſual terms, and the ſubſequent part of the proceſs will fall of courſe.

Same day.
Shee *againſt* Fitzgerald.
An order made ſo long ago as 1779, cannot be moved upon. It muſt be moved *de novo*.

SHEE againſt FITZGERALD.

MR. *Adams* moved to make abſolute a conditional order obtained in 1779, or, if the court ſhould think it could not at this diſtance of time be made abſolute, to let it ſtand as a conditional order.

Per Curiam. You cannot now come to make abſolute a conditional rule conceived ſo long ago. Nor can the court let the order ſtand as conditional. You muſt move *de novo*.

ORMSBY

ORMSBY againſt NICHOLSON.

Wedneſday, Feb. 28. Ormſby *againſt* Nicholſon.

Eſtate ſold under a decree, purchaſer in poſſeſſion, and the money lodged in bank, but the conveyance not having been executed by plaintiff or defendant, conditional orders for attachments againſt them. The creditors of the eſtate cannot be paid their money out of bank, but muſt have liberty to proceed againſt the eſtate at law.

MOTION on behalf of ſeveral of the creditors of the defendant, that the Accountant General might draw on the bank, for the ſums reported due to them reſpectively; or that they ſhould be permitted to proceed, as they ſhould be adviſed, on their judgments, without incurring the diſpleaſure of the court.

The lands of defendant had been ſold under a decree, the purchaſe-money paid into the bank, and the purchaſer, Mr *Douglas*, put into poſſeſſion; but the deeds not having been executed, nor the counterparts of the tenant's leaſes delivered up; *Douglas* had obtained conditional orders for attachments, againſt both plaintiff and defendant. He now oppoſed this motion on the ſame ground.

Per Cur. (Barons *Hamilton* and *Metge*) While the orders for the attachments are depending, we cannot make an order that the creditors ſhould be paid their money out of Court: But they muſt be allowed to proceed on their judgments as they ſhall be adviſed.

FH
MVSEVM
BRITANNICVM

Friday March 2, 1787.

Exchequer. Revenue Side.

Friday, March 2, 1787.

Drew againſt Spencer.

Drew *againſt* Spencer.
In *cuſtodiam* cauſes in all notices the *cuſtodee* muſt be ſo entitled.

NOTICE of ſhewing cauſe, on behalf of a third perſon, Why a rule for an attachment againſt him ſhould not be made abſolute, was entitled as above, without ſaying, *Drew, Cuſtodee* againſt *Spencer.*

Per Curiam. That omiſſion cannot be gotten over. Let the rule for the attachment be made abſolute, but the attachment not to iſſue until farther order.

Semple Cuſtodee againſt Prior.

Same day. Semple cuſtodee, *againſt* Prior.
It being diſputed whether certain lands, are part of thoſe granted in *cuſtodiam*, the tenant is permitted to pay his rent into court.

FITZGERALD Serjeant ſhewed cauſe, Why *Bret*, a third perſon, ſhould not be attached, for diſtraining without the leave of the court. *Bret* claimed an annuity, charged on the lands of *Radowny* and *Ballybuggy*, which had been granted to an anceſtor of the defendant by the ſame patent, and are therein mentioned as diſtinct denominations. The deſcription in the deed of annuity, purſues the words of the patent. It appears by the *conſtat*, that the lands of *Radowny* only, were granted in *cuſtodiam*, and the diſtreſs was taken on the lands of *Ballibuggy*.

Mr. *M. Smith, contra.*—*Palmer*, the Tenant on whoſe application the conditional rule was granted,

granted, ſwears, That *Ballibuggy* has been always conſidered as a ſub-denomination of *Rathdowny*, and that he holds both under one leaſe, and pays one rent for them. An order has been ſerved on him to pay his rent to the *cuſtodee*, which if he do not obey, he is liable to attachment; and unleſs *Bret* be reſtrained by the court, he will harraſs *Palmer* by diſtreſs for his annuity.

Semple cuſtodee, *againſt* Prior.

Per Curiam. We cannot make the order for an attachment abſolute; for *Ballibuggy* and *Radowny*, ſeem by the patent to be diſtinct denominations: nor can we allow the cauſe, for that would be determining that they are ſo. Neither can we let the tenant remain in his preſent ſituation, ſubject to the diſtreſs of *Bret* on the one hand, and the attachment of the court on the other. The proper way will be to order the tenant *Palmer*, to pay his rent into court, one half-year within the other; and afterwards it may be decided to whom it ſhall belong. If it appear that *Bret* is entitled, the officer will apportion the rent.

The KING againſt UNDERWOOD and others.

Same day. The King *againſt* Underwood and others.

THE defendants had been found guilty upon an indictment for an aſſault, and a fine of 100*l.* each, had been impoſed on them; with ſentence of impriſonment, until payment. The fines were eſtreated, and the defendants were afterwards pardoned.

After fines have been eſtreated the defendants obtain a pardon. The fines cannot be diſcharged by the court upon a certificate of the conviction and pardon; but the court give leave to enter an *O. Ni.* upon theſe articles in the ſheriff's accounts.

Fitzgerald,

The King *againſt* Underwood and others.

Fitzgerald Serjeant, on behalf of *James* and *Exſhaw*, who, when the fines were eſtreated, were ſheriffs of the county of the city of *Dublin*, moved, That they ſhould be exonerated from theſe fines, and that the Clerk of the Pipe ſhould be directed to allow them credit for the ſame in paſſing their accounts.

This motion was grounded on a certificate of the record of the indictment and pardon.

Per Curiam. This certificate is not ſufficient to enable the court to diſcharge theſe fines: they ſhould be diſcharged under the Great or Privy ſeal. All we can do is to let an * *O. Ni.* be entered as to theſe articles; though we do not uſually allow of ſuch entries in paſſing the *Sheriff*'s accounts.

Same day. Lindſay cuſtodee, *againſt* Baker.

Lands granted in *cuſtodiam*. Head landlord cannot diſtrain for rent without leave of the court. If he do, the tenants muſt not pay him, but apply to the court for an attachment againſt him; elſe they will be attached.

LINDSAY, Cuſtodee againſt BAKER.

MR. *Curran* on behalf of the tenants of the lands granted in *cuſtodiam* ſhewed cauſe, why they ſhould not be attached for not paying their rents to the *cuſtodee*, in purſuance of the order of the court ſerved on them before the rents were due. The tenants ſet forth in their affidavit, That before and ſince the ſervice of the order, they had been diſtrained by the agent of Lord *Mount Caſhel*, the head landlord, and compelled to make payments by which they have overpaid all the rent due.

* i. e. *Oneratur niſi ſufficientem habeat exonerationem.* 4 Inſt. 116 vid. Gilb. Exchq. laſt page.

Per

Lindſay cuſtodee *againſt* Baker.

Per Curiam. The head landlord certainly has a right to be paid his rent; but then he ought to apply to this court for leave to diſtrain. He cannot be permitted to be his own carver. The eſtabliſhed rule of the court is, That after the ſervice of the order of *cuſtodiam*, the tenant ſhall not pay rent to any but the *cuſtodee*; and though the head-landlord ſhould diſtrain him without leave of the court, the tenant muſt nevertheleſs comply with the order, and muſt apply to the court, for an attachment againſt the head-landlord for diſtraining. Here the contempt is confeſſed by the affidavits, ſo the rule for the attachment muſt be made abſolute, but not to iſſue till further order; that the tenants may have an opportunity of applying for an attachment againſt the head-landlord.

Rule made abſolute.

Same day.

Agar cuſtodee *againſt* Bowers.

The court will not give a third perſon leave to iſſue an habere on a judgment obtained two years before, of lands in *cuſtodiam*.

AGAR Cuſtodee againſt BOWERS.

A CONDITIONAL Rule had been obtained on behalf of a third perſon, for leave to iſſue an *Habere* on a judgment in ejectment grounded on an *Elegit*.

Mr. *Recorder* ſhewed for cauſe, that from the affidavit, on which the conditional rule had been obtained, it appears that the judgment was obtained ſo long ago as *Michaelmas* Term, 1784.

Per cur. After a party has lain by for upwards of two years, we cannot give him leave to iſſue an *habere*.

Cauſe allowed.

LINDSAY

Lindſay cuſtodee *againſt* Baker.

Motion for liberty for head landlord to diſtrain. The affidavit muſt contain a denial of colluſion.

LINDSAY Cuſtodee againſt BAKER.

MR. *Yelverton* moved on behalf of Lord *Mountcaſhel*, a third perſon, for liberty to diſtrain, or bring an ejectment for rent due to him as head-landlord. The *Attorney General*'s conſent had been obtained, and an affidavit made of an arrear of rent due.

Fitzgerald, Serjeant *contra*, objected that the affidavit did not deny colluſion.

Yelverton, Ch. B. It ſeems as neceſſary that there ſhould be a denial of colluſion in the caſe of landlords as of other perſons; for the only reaſon which makes an application to the court neceſſary, is in order to prevent colluſion againſt the King's tenant. But ſince the practice, as reported by the officer, has in the caſe of landlords been otherwiſe; this muſt be ruled accordingly. But for the future let it be underſtood, that in all applications of this kind, as well on behalf of landlords as others, the affidavit muſt contain a denial of colluſion.

Sat. March 3. Ex parte Corporation of the city of Cork.

Fines granted to a corporation muſt nevertheleſs be eſtreated and levied by the proceſs of the Exchequer, and cannot be paid to the corporation in the firſt inſtance.

Ex parte *Mayor*, *Sheriffs*, and *Commonalty* of the County of the City of *Cork*.

MR. *Solicitor General* on behalf of the Mayor, Sheriffs, and Commonalty of the county of the city of *Cork*, moved that the ſeveral late ſheriffs of the county of the ſaid city

might

might be allowed the ſeveral fines and amerciaments charged in their accounts; and that they ſhould be exonerated therefrom, and that all future ſheriffs of the county of the ſaid city, be allowed all fines and amerciaments whatſoever, that may ſtand charged on their accounts by the clerk of the pipe, without firſt applying to this honourable court; all the fines and amerciaments, whatſoever impoſed at the aſſizes and ſeſſions of the peace held in and for the county of the ſaid city, being granted to the ſaid mayor, ſheriffs and commonalty, and their ſucceſſors for ever, by letters patent of king *Charles* I. bearing date the 4th of *April*, in the ſeventh year of his reign. *Ex parte* Corporation of Cork.

This motion was founded on the above charter, and three orders that had been made in this court. The firſt was in 1682, on the application of the corporation, that the clerk of the pipe ſhould allow ſuch fines and amerciaments, and that the ſheriff ſhould be exonerated from them; but that if any ſhould exceed 5l. the court ſhould be previouſly informed thereof. The ſecond order was in 1741, to allow a fine of 10l. on an application in purſuance of the former order, and on a certificate of the then *Attorney General* (Mr. *Caulfield.*) The laſt was a ſimilar order in 1743.

Yelverton, Ch. B. Theſe fines cannot veſt in the crown, but by matter of record, which is the eſtreating into the Exchequer. It may be a queſtion therefore, whether they could paſs from the crown by the charter, before they had veſted. But even if they did paſs they cannot be legally levied without the proceſs of this court. The ſheriff therefore muſt *tot* for them.

Power,

Ex parte Corporation of Cork.

Power, B. If theſe fines have been granted to the corporation of *Cork*, they muſt nevertheleſs be firſt paid into the Exchequer, and then the corporation muſt apply to get them out.

Mr. *Bennet* in ſupport of the motion. It is laid down in the *Banker*'s caſe, that if a perſon have an exemption from fines, he need not pay them into the Exchequer; but if he do, he ſhall not get them out again; he ſhould apply by petition to be excuſed from paying them in. The order of 1682 empowers the clerk to exonerate the ſheriff from fines under 5l. we only want to make that order general, to ſave the expence of ſpecial applications to the court.

Power, B. That order does not ſeem to be legal; for though the court has power to make orders to enforce the law; it has none to diſpenſe with or alter it. It is of great importance that theſe fines ſhould be levied, if they be ſuffered to be accounted for to the corporation, without being paid into the Exchequer, they never will be levied, and the not levying of the fines is one great cauſe of the commotions in this country.

No order. *

* Vide Gilb. Law of Diſtreſſes, p. 15. *London* edit. 1780. S. P.

WARD

WARD Cuſtodee againſt TEMPLETON.

ATTORNEY GENERAL againſt PAULIN.

Same day. Ward cuſtodee *againſt* Templeton.

Coſts not allowed in traverſing an inquiſition.

PAULIN had leave to traverſe an inquiſition, and had gotten judgment for want of a replication.

Mr. *Attorney General* now moved on behalf of *Paulin*, that *Ward* ſhould be ordered to pay him the coſts he had been put to in traverſing the inquiſition. He cited the caſe of *Reeves* and *Bindon* in this court, *February* 25, 1723, where ſuch an order was made.

Fitzgerald, Serjeant, *contra*. That is a ſingle caſe, and *Buller's niſi prius*, 361. is deciſive to the contrary. The ſtatute of *Glouceſter* extends only to give coſts in actions real, perſonal, and mixed; therefore traverſes of inquiſition are not within it.

Per cur. Coſts certainly are not to be paid in ſuch caſes. The late ſtatute concerning the king's debts, relates only to the recovery of his real debts; beſides, here the coſts, if any, muſt be againſt the *Attorney General*.

Motion refuſed.

M'NEMARA

Same day. M'Nemara cuſtodee *againſt* Blood.

M'NEMARA, Cuſtodee againſt BLOOD.

Dillon and *Aylwood*, Aſſignees Cuſtodees againſt ſame.

Dillon and *Aylwood*, Cuſtodees againſt ſame,

Burton, Cuſtodee againſt the ſame.

Subſequent *cuſtodee* receives the rent. The prior *cuſtodee* cannot move that he ſhall be obliged to account before the officer, but muſt apply for an attachment on the contempt.

THE *Attorney* and *Solicitor General* on behalf of *Burton*, the fourth *cuſtodee*, to ſhew cauſe againſt an order, that he ſhould account before the proper officer, for the rent that he had received from the tenants of the lands granted in *cuſtodiam*, and be obliged to pay over to *Aylwood* and *Dillon*, aſſignees of *M'Nemara*, ſuch as he ſhould appear to have received, unleſs cauſe.

The cauſe ſhewn was, that this was not the regular way of proceeding. The prior *cuſtodee* ſhould have applied for an attachment upon the contempt which ought to have been firſt eſtabliſhed; and then to purge the contempt, and get rid of the attachment, the *cuſtodee*, in the fourth cauſe, muſt have accounted for the rents he had received.

Mr. *Wolfe*, Mr. *Curran*, and Mr. *M. Smith*, *contra*. The contempt is not the argument of counſel on behalf of the prior *cuſtodeee*, who has a right veſted in him as tenant to the crown; but it is the ground upon which the court will proceed to puniſh. From *Burton*'s own affidavit, it appears that he has received the rents in direct violation of the rules of the court; ſo that even the contempt is clear, were that neceſſary to induce the court to interfere. Will the court

ſay

M'Nemara cuſtodee *againſt* Blood.

ſay you have ſhewn us all the facts that are neceſſary, but becauſe you have not taken the round-about method to do it, we will not aſſiſt you? We come not here to vindicate the authority of the court, but on the right the firſt *cuſtodee* has to the rents in preference to the fourth.

Yelverton, Ch. B. This is a queſtion of right between the *cuſtodees*, and that right muſt be eſtabliſhed before we can decide on the conſequences of it. But it cannot be determined in the way in which the queſtion is now brought forward.

The cauſe muſt therefore be allowed with coſts.

GRAHAM, Aſſignee of LAMEY, cuſtodee, againſt KENNEDY.

Same day. Graham cuſtodee *againſt* Kennedy.

MR. *Downes*, on hehalf *Archbold*, a third perſon, who was a mortgagee out of poſſeſſion, and alſo intitled to an annuity out of the lands, moved for leave to traverſe the inquiſition.

Annuitant cannot traverſe the inquiſition, but may diſtrain. Mortgagee of *cuſtodiam* lands has a right to have a receiver unleſs the *cuſtodee* will conſent to pay him the intereſt.

Per cur. An annuitant cannot traverſe the inquiſition, but he may diſtrain with the leave of the court. A mortgagee is intitled to have a receiver

Graham cuſtodee *againſt* Kennedy.

receiver appointed, unleſs the *cuſtodee* conſent to pay him his intereſt.

No rule——The *cuſtodee* conſenting to pay the intereſt of the mortgage, out of the rents as they ſhould be received.

End of *Hilary* Term, 1787.

HOUSE

HOUSE OF LORDS.

House of Lords. Haire *againſt* Lloyd, & al.'

Wedneſday March 7, 1787.

JAMES HAIRE, Gent. Plaintiff in Error.

WILLIAM LLOYD, JOHN ARMSTRONG, and EDWARD CONNOR, Defendants.

THIS came before the Houſe of Lords by a writ of error, upon a judgment of the court of King's Bench in replevin. The plaintiff, *Haire*, had filed his declaration in the common form; to which the defendants put in the following avowry and cognizance. "And the "ſaid *William Lloyd*, *John Armſtrong*, and *Ed-* "*ward Connor*, by T. L. their attorney come, "and defend the wrong and injury when, &c. "and the ſaid *William* well avows, and the ſaid "*John* and *Edward*, as bailiffs to the ſaid *Wil-* "*liam*, well acknowledge the taking of the ſaid "goods and chattels in the ſaid place in which, "&c. and juſtly, &c. becauſe they ſay, that "the ſaid *James Haire* continually from the 1ſt "day of *May*, in the year of our Lord, 1783, "until and upon the 1ſt day of *May* then next "following, and from thence, until the *ſame* "time when, &c. enjoyed the ſaid place in "which, &c. with the appurtenances, *by vir-* "*tue of a demiſe, at and under the yearly rent of* "1l. 12s. by the acre, payable half yearly on "every 1ſt day of *November*, and 1ſt day of *May*

An avowry for for rent under 25 Geo. 2. d. c. 13. ſect. 4. need not ſtate by whom the demiſe under which the premiſſes were held had been made. What is a good avowry under that ſtatute. The ſtatute extends to parol demiſes.

HOUSE of LORDS. Haire *againſt* Lloyd, & al.

" in every year, by even and equal portions, " and becauſe the ſaid place in which, &c. con- " tains five acres, two roods and five perches, " and becauſe 8l. 17s. of the rent aforeſaid, " for one whole year's rent due and ending on " the 1ſt day of *May A. D.* 1784, on that day, " in that year, and alſo at the ſaid time when, " &c. were due and payable, and in arrear and " unpaid by the ſaid *James Haire* to the ſaid " *William Lloyd, as landlord of the ſaid premiſſes*; " he the ſaid *William Lloyd* well avows, and the " ſaid *John* and *Edward* well acknowledge the " taking of the ſaid goods and chattels in the " ſaid place in which, &c. and juſtly, &c. as a " diſtreſs for the ſaid 8l. 17s. of the rent afore- " ſaid, ſo then being in arrear and unpaid, &c. " which ſaid rent is ſtill wholly due and unpaid " to the ſaid *William Lloyd*, and this they are " ready to verify; whereof they pray judg- " ment, and a return of the goods and chattels " aforeſaid, together with their damages, coſts, " charges, purſuant to the ſtatute in that caſe " made and provided, to be adjudged to them.

To this avowry and cognizance the plaintiff demurred, and ſhewed for cauſe—" That it is " not ſet forth or ſtated in the avowry of the " ſaid *William Lloyd*, or in the cognizance of " the ſaid *John Armſtrong* and *Edward Connor*, " by whom the demiſe mentioned in the ſaid " avowry and cognizance was made; and alſo " that the ſaid avowry and cognizance are un- " certain and want form." Defendants joined in demurrer; and in *Hil.* 29 Geo. 3. Judgment was given for the defendants; and in *Eaſter* term following, they obtained final judgment, to reverſe which this writ of error was brought.

It

It was argued on *Monday March* 5, 1787, by Mr. *Attorney General*, and Mr. *Warren* for plaintiff; and by Mr. *Curran* and Mr. *Jameſon* for the defendants; and on *Wedneſday* Mr *Attorney General* replied; after which the Lord Chancellor delivered his opinion.

HOUSE of LORDS.

Haire *againſt* Lloyd, & al.'

The matter now before your lordſhips in point of property is a mere trifle; but the real matter in queſtion is of great concern and moment to all the landlords and landholders in the kingdom. It is the conſtruction of a ſtatute, which was made for the eaſy recovery of rent, the 25 *Geo.* 2. 13. Before that act landlords were under great difficulties in making diſtreſſes, and in ſupporting them when made. It has been inſiſted on at the bar, that when you juſtify the taking of the diſtreſs, you muſt ſhew a privity between you and the tenant on whom you diſtrain. That principle brought infinite difficulties upon the landlord; if they were to remain, I ſhould agree with Mr. *Attorney General*, that a landlord had better have recourſe to ejectment than the old remedy by diſtreſs; for by diſtraining he may be involved in great difficulties. Diſtreſs is the natural remedy; if there be ſufficient on the land to ſatisfy the landlord's demand, he can go to the land, and there ſeek his remedy; it is a better remedy than an ejectment, if you have a good tenant, for then you would wiſh to keep him, and by an ejectment you loſe him; ſo that if diſtreſs can be made a remedy free from difficulty, the legiſlature would go great lengths in ſupport of it.

Avowing was the great difficulty at common law; for if a perſon ſhould have diſtrained for rent, he was obliged to ſhew in his avowry a

HOUSE of LORDS.

Haire *againſt* Lloyd, & al.'

privity in law between himſelf and the perſon on whom he diſtrained. Suppoſe this caſe, and indeed it is the caſe of almoſt every perſon of landed property in the kingdom. The tenant holds under a leaſe made 150 years ago. The title deeds may be in *England*, or in the hands of truſtees, or of mortgagees. If it be neceſſary (as was the caſe before this act) to ſet out the privity, you muſt in your avowry ſhew that the demiſe was made 150 years ago, by ſuch a perſon, and then how you came by that eſtate; it may be, that you derive by one or more wills, and through a variety of meſne conveyances, all which you muſt ſet forth, till at laſt the right attaches in yourſelf. If your title deeds were in the hands of truſtees or mortgagees, you could not ſet forth theſe things. It was therefore neceſſary to make ſome proviſion by the ſtatute to relieve landlords from theſe difficulties in ſetting out their title. Suppoſe you even had the title deeds, and could ſtate the leaſe: it might have been made by two or three perſons, as by *J. S.* and *R. S.* you muſt take care that you plead it according to its legal operation. It might happen that *John* was tenant for life, and *Richard*, remainder-man in tail, or in fee; in point of law, that would not be the demiſe of both; but the demiſe of the tenant for life, and confirmation of him in remainder, and to plead it as the demiſe of both would be fatal; ſo ſays Lord *Coke* (1 *Inſt.* 45. *a.*) and it might be very difficult for the avowant to know that that was the caſe. Theſe difficulties, therefore, the legiſlature in *England*, thought it neceſſary to remedy; (for ſometimes *England* has taken the lead, and ſometimes *Ireland*. *Ireland* took the lead in 4 *G.* 2. but in 11 *G.* 2. *England* took the

the lead.) The ſtatute was not intended to make any alteration in the evidence that ſhould be given at the trial; but only took away the difficulties in making out the caſe for taking the diſtreſs, which you were obliged to decide upon in a moment. Difficulties which would often embarraſs an experienced lawyer, and on which of courſe country gentlemen could not be ſuppoſed to be competent to determine. On the trial you muſt prove the title in the ſame manner as before. The ſtatute meant that where the landlord takes diſtreſs he need only ſay, you *A. B.* hold lands under a demiſe, and ſo much rent is become due to me as landlord. It is ſaid that when this ſhould come to trial, it could not be known what was to be tried, and that great difficulties would ariſe; for the tenant would be at a loſs what anſwer to put in to ſuch an avowry. I think there is a very plain and honeſt anſwer, if his caſe be honeſt; he might ſay, that "he did not from ſuch a time to ſuch a time, continue to enjoy the ſaid lands as tenant thereof to ſaid *William*, by virtue of a demiſe under ſuch a rent as in and by the above avowry is ſuppoſed;" or he might by leave of the court plead double. "That he did not enjoy under ſuch a demiſe," and ſecondly, "That there was not ſo much rent due to the avowant as landlord;" or he might plead by way of inducement, that he did hold under ſuch a demiſe, and traverſe the rent due; then the traverſe to be tried would be ſimply whether under a demiſe held of theſe lands, ſo much rent was due to the avowant as landlord.

HOUSE of LORDS.
Haire *againſt* Ltoyd, & al.'

The act does not alter what was neceſſary to be proved on the trial. The landlord muſt prove, that the lands were held under ſuch a demiſe, and that ſo much rent was due, and

HOUSE of LORDS.

Haire *againſt* Lloyd, & al.

that the tenant had paid to his ſteward rent from time to time, which would ſhew that he was landlord: thus after proof of the demiſe, he would ſhew himſelf entitled to it. This would be very eaſy in pleading, and no principle would be broken in upon at the trial. It is ſaid, that in *Syllivan* & *Stradling* (2 *Wilſon* 208.) the avowant ſet forth by whom the demiſe was made. But what ſays the act? not that the landlord ſhall avow that the tenant held under a demiſe, ſetting forth by whom the demiſe was made; but *under a demiſe, without ſetting forth the grant, tenure, or demiſe, or title of ſuch landlord.* This is the Engliſh act. The Iriſh act ſays the ſame.

It is ſaid, that this act relates merely to demiſes in writing; but the words of the act ſhew directly the contrary: they are "under a grant "or demiſe, *or* article, minute, or contract in "writing." But it is ſaid, that the words *in writing*, apply to *grant or demiſe*, as well as to *article, minute, or contract*; but it is manifeſt they do not; for the conjunction *or*, is between the word *demiſe*, and the word *article*. This is plain from the grammatical conſtruction, as well as the grievance that was intended to be remedied.

Until that caſe of *Syllivan* & *Stradling* was mentioned at the bar, I had entirely forgotten it; but I now recollect it perfectly well, and many circumſtances attending it. I remember that I argued it. There the perſon was named that made the demiſe. I endeavoured to avail myſelf of that circumſtance, and contended that the naming of him, gave the plaintiff an opportunity of ſaying, that the leſſor had nothing in the lands. One judge heſitated ſome time.

time. On further conſideration, they at laſt all agreed, that the meaning of the act was, that the defendant need only *avow generally that the tenant held under a demiſe:* ſo the naming the perſon was unneceſſary, and therefore the plea of *nil habuit in tenementis* was held to be bad. From that time I believe the courſe of pleading was changed. I did myſelf ſome buſineſs in that line; and after the determination of that caſe, I never named the perſon who made the demiſe, and I remember it was ſaid by one of the judges, that when a mode of pleading is given by a ſtatute, to purſue the very words of the act was never held bad pleading.

House of Lords. Haire *againſt* Lloyd, & al.

I have no difficulty concerning this matter in my own mind; but it is right that your Lordſhips having the judges of the land to direct you, ſhould not be bound by thoſe of *England*, or any faint recollection of mine. I think you ſhould therefore take the opinion of your own judges, and by that means you will always preſerve the laws of your country uniform.

Becauſe it has been ſaid, That no good anſwer could be given to this avowry, I would propoſe two queſtions to the Lords the judges.

1ſt. Whether in anſwer to this avowry, it would not be a good plea, to ſay, that the ſaid *James*, did not continually from the 1ſt day of *May* 1783, until and upon the 1ſt day of *May* then next following, and from thence until the ſame time when &c. enjoy the ſaid place in which, &c. as tenant thereof, to the ſaid *William*, under a demiſe thereof, at the above rent as in and by the above avowry is ſuppoſed, and conclude to the country.

2d. (Which indeed would alone be ſufficient) Whether the avowry and conuſance, to which there

HOUSE of LORDS.

Haire *againſt* Lloyd, & al.

there was a ſpecial demurrer, as they appear on record before the Houſe, are not good in point of law, within the act 25 *G.* 2 c. 13.

It was agreed, that the ſecond queſtion would be alone ſufficient: accordingly that queſtion was put, and the Lord Chief Baron declared the opinion of the judges to be:——That the avowry and conuſance were good in point of law, within the act.

Lord *Pery* declared his acquieſcence in the opinion of the judges: though it was contrary to his own private opinion.

Lord *Earlsfort.* I have liſtened with the greateſt attention to the arguments on both ſides, and have given the caſe as much conſideration as I could both during the argument below, and ſince the writ of error has been lodged; and upon as clear grounds as I ever formed an opinion, I am ſatisfied with that now delivered by the judges. I did not think myſelf at all bound by the deciſion of my court, or by what was then my opinion, but was as much open to a conſideration of the queſtion as if it never had been argued.

Judgment affirmed.

HOUSE

HOUSE OF LORDS.

Friday March 23, 1787.

JOHN BOYLE, Esq; Appellant.

ANNE LYSAGHT, MARY COOTE PURDON, Administrators of HENRY WRIXON Esq; Respondents.

Boyle, appellant, Lysaght and Purdon administrators of Wrixon respondents.

THIS was an appeal from a decree of the Court of Exchequer, by which *Henry Wrixon* was decreed intitled to a renewal from the appellant of a lease of the lands of *Knockaneglass* and *Killynecronane*, containing about 600 acres in the barony of *Duhallow*, and county of *Corke*. The last and only existing lease was executed by the appellant's father, in the year 1739. In it was recited, That in the year 1660 *John* Lord *Kingston*, being seized in fee of the premises, demised them to two persons of the names of *Uppington* and *Nagle*, for 99 years from the 1st day of *November* then next, if three lives then in being, and named in the lease, or any, or either of them should so long live, at the yearly rent of 20*l.* payable half yearly, with a *nomine pœnæ* of 2*s.* 6*d.* for each day said rent should remain unpaid after demand; and in said lease was contained a covenant *for renewal for ever*, on the fall of every life, on tenant's paying 20*l.* for each renewal within twelve months after the fall of each life. That the inheritance being afterwards vested in *Bellingham*

Decree affirmed, by which tenant was declared intitled to a renewal of his lease, containing an intricate and perplexed clause, which had been considered by the parties as a covenant for perpetual renewal. The history of renewable leases and the principles upon which renewals have been decreed. Terms for years determinable upon lives, with covenants for renewals, are within the tenantry act, 19 & 20 *G.* 3. c. 30.

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

lingham Boyle the elder (the appellant's great uncle) and the intereſt of the leaſe in *John Freeman*, and one of *ceſtui-qui-vies* having died, a renewal was exeeuted in the year 1717 by ſaid *Bellingham Boyle* to *John Freeman* for 99 years, provided *Judith Freeman*, otherwiſe *Crofts*, *William Freeman*, and *Richard Williams*, or any or either of them ſhould ſo long live, *with the like covenants*, &c. as were contained in the ſaid original leaſe. The leaſe of 1739, further recites the death of *William Freeman*, one of the lives, and that the leſſee had, within the time limited by the covenant paid the renewal fine and nominated another *William Freeman*, to be inſerted in the place of the life fallen. In 1739, the inheritance being veſted in *Bellingham Boyle* the younger, (father to the appellant) and the intereſt of the leaſe in *Henry Freeman*, *Bellingham Boyle* the younger, by indenture, dated 7th *January* in that year, demiſed the lands to *Henry Freeman*, for 99 years, provided *Judith Freeman*, *William Freeman* and *Richard Williams*, or any, or either of them, ſhould ſo long live, ſubject to the former rents, *nomine pœnæ*, clauſes, &c. The clauſe therein, which the reſpondents contended was to be conſidered as a covenant for perpetual renewal was this: "Provided always, and upon this further and "expreſs condition, that if any of the ſaid par- "ties, viz. *Judith Freeman*, alias *Crofts*, widow "of *Richard Freeman* deceaſed, *Richard Wil-* "*liams* ſon of the ſaid *Oliver Williams* and "*William Freeman* ſon of the ſaid *John Free-* "*man*, ſhall or do happen to die before the ſaid "term hereby demiſed, and that ſuch other "perſon or perſons who ſhall then have the "eſtate and intereſt for the years hereby de- "miſed and then to come of and in the pre-

"miſes

" miſes by ſurvivorſhip or any other way, ſhall
" not, within the ſpace of twelve months next
" after the deceaſe of ſuch of them the ſaid
" *Judith Freeman* alias *Crofts*, widow, *Richard*
" *Williams* ſon of the ſaid *Oliver Williams* and
" *William Freeman* ſon of the ſaid *John Free-*
" *man*, which ſhall firſt happen to die, by his or
" their deed or deeds lawfullly executed, ſur-
" render and yield up unto the ſaid *Bellingham*
" *Boyle* his heirs or aſſigns, or to ſuch other per-
" ſon or perſons to whom the next or immediate
" reverſion or remainder of the ſaid premiſes
" expectant upon the ſaid term and demiſe
" hereby made, ſhall then reſpectively apper-
" tain, all his and their eſtates, term and inter-
" eſt made and granted by virtue of theſe pre-
" ſents either abſolutely or upon condition in
" in the ſaid deed or ſurrender to be contained,
" to this effect, *viz.* That if any ſuch perſon
" or perſons to whom ſuch ſurrender ſhall be
" made, ſhall not within the ſpace of three
" months after delivery of ſuch deed of ſurren-
" der and payment to him or them made of the
" ſum of 20*l. Sterling*, of lawful money of
" *Great Britain*, and tender made of an in-
" groſſed draft imprinted or otherwiſe purport-
" ing a new leaſe of the ſaid premiſes to be
" made to ſuch perſon or perſons ſo ſurrender-
" ing the ſame, their executors, adminiſtrators
" and aſſigns for the term of 99 years to begin
" from the ſaid firſt day of *May* laſt paſt, and
" to be determinable upon the death of ſuch of
" them the ſaid *Judith Freeman*, alias *Crofts*,
" widow, *Richard Williams* and *William Free-*
" *man* ſon of the ſaid *John Freeman* aforeſaid,
" as ſhall be then living, and the death of one
" other perſon then living to be nominated by
ſuch

House of Lords.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

" ſuch party ſurrendering, and in ſuch in-
" groſſed draft to be named, and the death of
" the longeſt liver of them, *with the like reſer-*
" *vations conditions and covenants, as in theſe pre-*
" *ſents are contained Mutatis Mutandis* and with
" the like condition for ſurrendering *mutatis*
" *mutandis*, as in this preſent proviſoe, ſeal and
" deliver the ſaid draft as his, her, and their
" act and deed, then the ſaid ſurrender to be
" void; then theſe preſents, and all the
" eſtate hereby granted ſhall from thenceforth
" ceaſe and be void. And the ſaid *Bellingham*
" *Boyle*, doth hereby for himſelf his heirs and
" aſſigns covenant to and with the ſaid *Henry*
" *Freeman*, his executors, adminiſtrators and
" aſſigns, that he the ſaid *Bellingham Boyle* his
" heirs and aſſigns, ſhall and will *from time to*
" *time*, on ſuch ſurrender and payment and re-
" ſervations aforeſaid, perfect, ſeal and deliver,
" ſuch deed in manner as herein provided, and
" that if he or they, or his or their heirs or
" aſſigns, or the heirs or aſſigns of the ſurvivor
" of them ſhall refuſe ſo to do for the ſpace of
" three months after ſuch ſurrender, that then
" the ſaid deed of ſurrender, and every clauſe
" thereof, ſhall be void, and this preſent deed
" to remain and abide good and firm in the law
" to the ſaid *Henry Freeman*, his executors and
" and aſſigns for their lives reſpectively, and af-
" ter their deaths to their executors adminiſtra-
" tors and aſſigns for the remainder of the ſaid
" term of 99 years herein mentioned nominated
" and expreſſed under the ſame yearly payments
" and reſervations therein likewiſe expreſſed
" and that the executors, adminiſtrators and
" aſſigns of the ſaid *Henry Freeman* and the ſur-
" vivor of them, ſhall and may peaceably and
" quietly

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

" quietly have, hold, and enjoy the ſame with-
" out any let, trouble or moleſtation of him the
" ſaid *Bellingham Boyle* his heirs and aſſigns and
" any perſon claiming or deriving by, from or
" under them or either of them for the remain-
" der of the ſaid 99 years, the ſaid ſurrender
" or any thing in this preſent demiſe to the con-
" trary thereof, in any wiſe notwithſtanding."
In 1739 or 1740 *Judith Freeman* died, and in *April* 1744, the intereſt in the leaſe was conveyed to *Henry Wrixon* (ſubject to ſome incumbrances which he has ſince paid) in conſideration of the ſum of 1200*l.* and upwards. In 1749, *Wrixon* paid Mr. *Boyle* a renewal fine of 20*l.* and nominated a life in the place of *Judith Freeman*; Mr. *Boyle* giving this receipt, " Re-
" ceived from *Henry Wrixon*, Eſq; by the hands
" of Mr. *Nicholas Wrixon*, the ſum of 20*l.*
" *ſterling*, for a renewal fine of his leaſe of the
" lands of *Freemount* and *Knockaneglaſs*, in the
" county of *Cork*, for inſerting the life of *Free-*
" *man Crofts*, ſon of *Wills Crofts* of *Churchtown*,
" in the county of *Corke*, in the place of *Judith*
" *Freeman*, deceaſed, the life therein named.
" *Dublin*, *Jan.* 16th 1749. *Bellingham Boyle.*"
On the 22d of *April*, 1760, *William Freeman*, another *ceſtui-qui-vie* died; in 1765, *H. Wrixon* paid the renewal fine, with three years intereſt, and nominated a life, to *James Harnett*, Mr. *Boyle*'s agent, who gave this receipt, " Re-
" ceived from *Henry Wrixon*, Eſq; of *Glinfield*,
" 20*l.* *ſterling*, fine, on renewal of his leaſe of
" *Freemount* and *Knockaneglaſs*, and alſo 3*l.* for
" intereſt of ſaid ſum for three years; the life
" now named by Mr. *Wrixon*, being that of
" *Robert Sealy*, ſon of *George Sealy*, of *Bandon*,

" in

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

" in the room of *William Freman*, Gent. *Corke*, " 18th *November*, 1765. I ſay received for " the uſe of *Bellingham Boyle*, Eſq; *James Har-* " *nett*" In 1771, the appellant's father died; whereupon the inheritance veſted in the appellant, and in *November* of the ſame year *Richard Williams*, the laſt of the *ceſtui-qui-vies* in the renewal of 1739, died. In 1774, *H. Wrixon* applied to *Thomas Fuller* the appellant's agent, to receive the renewal fine, and to have a life named. *Fuller* wrote to the appellant for his permiſſion; but not receiving any anſwer, he concluded Mr. *Boyle* was ſatisfied to renew. He accordingly took the fine, and gave this receipt, " Received from *Henry Wrixon*, Eſq; 20*l. ſterl.* " fine, on renewal of his leaſe of *Freemount* " and *Knockaneglaſs*, for inſerting the life of " *James Fuller*, ſon of Mr. *Thomas Fuller*, trea- " ſurer of the county of *Corke*, in the place of " *Richard Williams*, deceaſed. Received by " me, for *John Boyle*, Eſq; *Corke*, *June* 24, " 1774. *Thomas Fuller*." But having afterwards received a letter from the appellant's attorney, deſiring him to return the fine, he applied to Mr. *Wrixon*, who conſented to take back the fine, and give up the receipt, which he did on the 13th of *Auguſt* 1774. The appellant continued to receive the rent reſerved by the leaſe to 1776. In 1780, he brought ejectments on the title, as of *Trinity term*, laying the demiſe on the 1ſt day of *June* in that year *. On the

* In the ſtat. 19 & 20 *Geo.* 3. c. 30. commonly called the tenantry act, it is provided, That nothing therein contained ſhall affect any judgment or decree already given or made, or *any ſuit commenced before the* 15th *of May*, 1780, for the recovery of the poſſeſſion, &c. on account of any leaſe or leaſes not having been renewed according to the covenants for perpetual renewals, therein contained.

8th

8th of *November*, Mr. *Wrixon* filed his bill, praying, That the appellant might be obliged to execute a renewal of the ſaid leaſe, purſuant to the ſaid original leaſe, for the lives of the ſaid *Freeman Crofts*, *Robert Sealy* and *James Fuller*, tendering the fine and intereſt for the ſame, according to the uſual mode of computation, and praying that the appellant might be reſtrained by injunction from proceeding on the ejectments; and alſo praying general relief. The appellant in his anſwer, admitted the original leaſe and renewals; but inſiſted that the leaſe had become abſolutely void by non-performance of the terms of the proviſo, and therefore incapable of being ſet up by the acceptance of rents and fines; and though it were capable of being ſet up, yet that *Bellingham Boyle*, the appellant's father had not power to do it, having been made tenant for life, with limited powers, by a ſettlement made in 1736; and he further inſiſted, that fraud had been practiſed on his father, in concealing the true times of the falls of the lives.

House of Lords.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

Note. In the argument before the Lords, little was ſaid upon the ſettlement of 1736, and none at all upon the determination. It was a voluntary deed, not made upon marriage, or for any valuable conſideration.

On the 13th of *November* 1782, the court of *Exchequer* decreed, That the plaintiff was entitled to a new leaſe for a term of 99 years, provided the lives of *Freeman Crofts*, *Robert Sealy* and *James Fuller*, or any of them, ſhould ſo long continue, at the rent, and under the covenants, clauſes, proviſoes, conditions and agreements mentioned in the leaſe of 1739; upon the ſaid *Henry Wrixon*'s paying to the appellant the ſum of

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

of 20*l.* as a renewal fine, on the death of *Richard Williams*, with legal intereſt, from the 1ſt day of *November*, 1772, and alſo the ſum of 20*l.* as a renewal fine, with legal intereſt for the ſame, from the time that it ought to have been paid; together with all rent and arrears of rent, and that an account ſhould be taken thereof by the Chief Remembrancer or his deputy; and that the ſaid *Henry Wrixon*, ſhould pay unto the appellant, the coſts expended by him in the ſaid cauſe; the ſame to be taxed by the ſaid Chief Remembrancer or his deputy. In 1784, *Henry Wrixon*, died inteſtate. The reſpondents, his daughters and heirs at law, obtained adminiſtration and revived the cauſe. Mr. *Boyle* appealed from that decree of the court of *Exchequer*, and the appeal was heard the 21ſt, 22d, and 23d days of *March*, 1787. Mr. *Attorney General*, and Mr. *Wolfe* for the Appellant. —Mr. *Duquery* and Mr. *Curran* for the Reſpondents.—After the arguments at the bar, the Lord *Chancellor* addreſſed the houſe, as follows:

My Lords, your lordſhips have heard counſel on both ſides upon this appeal, and it is now ripe for your determination. In the courſe of the argument a good deal has been ſaid upon the ſubject in general, which I think is a matter of great and univerſal concern in this kingdom—I ſay of univerſal concern, becauſe a great part of the lands in this kingdom, has been for a long time held by leaſes depending upon lives, with covenants for perpetual renewal. In this I am warranted by the expreſs words of the recital of the ſtatute 19 and 20 of the king, chap. 30—"Whereas great parts of the lands in this kingdom are held under

leaſes for lives, with covenants for perpetual renewals upon payment of certain fines, at the times therein reſpectively mentioned for each renewal." It may be proper therefore not to ſpeak merely on the caſe now before us, but alſo to explain the hiſtory of this tenure in this kingdom, and the determinations concerning it in our courts. How long it has prevailed I do not pretend to ſay: it might have been firſt introduced in the north: but in the ſouth I believe it has prevailed ſince the time of the great Earl of *Ormond*; who, in order to people his vaſt eſtates in that part of the kingdom, and to invite a reſpectable and improving tenantry, introduced this tenure: it had the effect he deſired; and in the nature of the thing theſe leaſes have a tendency to create a reſpectable and improving tenantry. It obtained, till it had acquired theſe tenants, great reſpect, and very valuable properties, inaſmuch as they were conſidered to have a perpetual intereſt. In this I am warranted, not only by the expreſs words of the ſtatute, but by what it recites to have been decided by courts of equity, and countenanced by the declaration of judges. Theſe leaſes then were conſidered as perpetual intereſts, and upon that principle they gained ground, and became a fund for ſettlements of every kind, for mortgages, and other ſecurities for money. If a man had one of theſe leaſes, there would have been no more doubt of lending him money than if he had the fee. For ſome time, however, great difficulties did ariſe in courts of equity concerning theſe leaſes. Tenants, like other men, are ſubject to that misfortune attending on human nature, of neglecting

HOUSE OF LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

gleƈting their own affairs. I believe experience and obſervation will juſtify the remark, that mankind in general are extremely negligent about what concerns themſelves; partly by buſineſs of another kind, partly by pleaſure, they are diverted from looking into their own private affairs, and paying them that attention which they require. Hence it happened that tenants neglected to make renewals upon the fall of the lives, and were guilty of great laches: the landlords thereupon brought ejectments, and the tenants reſorted to courts of equity for relief; and courts of equity, where the breach was made up by an adequate compenſation, thought that they were intitled to relief: but ſtill conſiderable difficulties aroſe in eſtimating what ſhould be a compenſation, until that great man, Lord Chief Baron *Gilbert*, who preſided in the court of Exchequer in this kingdom, ſtruck out the compenſation of ſeptennial fines; conſidering a life as equal to ſeven years, upon the idea of the act which ſays, that if a man is not heard of for ſeven years, he is to be preſumed dead. That compenſation is a fine for every ſeven years, with intereſt: accordingly in the caſe of *Anderſon* and *Sweet*. 1717, he decreed a renewal to the tenant, upon payment of ſeptennial fines and intereſt; and this decree was affirmed by the Lords in 1722. (*Vide Brown.* P. C. 430.) Courts of equity were very glad to lay hold of that rule, and in every caſe that came before them afterwards, they held that the tenant was intitled to a renewal upon thoſe terms, except in caſes of fraud or dereliƈtion. There is a long ſtring of caſes that came into public diſcuſſion in the courts

courts, ſome with, and ſome without negative clauſes; for in ſome of theſe leaſes was inſerted an expreſs proviſo, that if the tenant neglected to renew within a certain time, he ſhould not have a right to call upon the landlord for a renewal. But yet notwithſtanding that clauſe, courts of equity adopted the ſame rule, in that very extraordinary caſe, as coming under the idea of compenſation, and in that caſe which has made ſo much noiſe, of *Murray* and *Bateman*, which came before me in 1776, I had a great number of thoſe caſes laid before me, beſides thoſe that had been cited at the bar. I directed a ſearch to be made, and I found that they abounded in the courts. I alſo enquired of the judges, of the ableſt men, and oldeſt practitioners in the Hall, and they all agreed that the uniform practice was to decree renewals in all caſes, except where there was fraud or dereliction on the part of the tenant. Some of thoſe perſons are now dead, Lord *Annaly*, Mr. Juſtice *Robinſon*, Mr. *Malone*, Ch. J. *Patterſon* and others, who were perfectly acquainted with the determinations that had been made, and they ſaid moreover that the caſes which had paſſed *ſub ſilentio* were *innumerable*. In conſequence of this general remonſtrance I formed my opinion, notwithſtanding any ideas upon the ſubject that I might have brought with me from England, where this kind of tenure is not known: accordingly I decreed a renewal. I did conſider that there was a *local equity*, and as I have often heard it called, the *old equity of the kingdom*. We all know the fate of that decree; upon an appeal to the Houſe of Lords in England, it was reverſed. I am ſatisfied that the princi-

HOUSE of LORDS.

Boyle, appellant, Lylaght and Purdon adminiſtrators of Wrixon, reſpondents.

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon reſpondents.

ples of it were not underſtood there. They were unacquainted with that *local equity*, and that it was the intent originally of the parties to convey a perpetuity: all this I ſay was unknown to them; they had no ſuch tenures; no ſuch determinations in that kingdom. Some very reſpectable and eminent men, who concurred in that reverſal, with whom I have ſince held converſation, have told me that they had altered and changed their opinion. They ſaid that according to *Engliſh* principles the reverſal was right, but that taking into conſideration the *uſage in Ireland*, and all the circumſtances of the caſe it was wrong. The voice of the people expreſſing a diſſatisfaction with that determination of the Lords, and a general alarm in conſequence, brought the point before the legiſlature, and the *old equity* was revived by the act of 19 and 20 of the king, ch. 30. After that reverſal and before the act, there were one or two caſes which came before me, in which I refuſed to give relief—they were caſes of ſtrong neglect; all the lives were gone I conſidered the determination of the great court of *dernier reſort* (as the Houſe of Lords of *Great Britain* then was) and I hope I always ſhall conſider the determination of the court of *dernier reſort*, as declaratory of the law of the land; and that I was not at liberty to ſet up my own opinion againſt it, and make a decree which was ſure to be reverſed; and indeed, it would have been cruel to the party. By the act the old equity was revived: indeed, even though it had never been made; after the ſupreme juriſdiction had been reſtored to this Houſe, I would have had no heſitation in determining as I had done before in *Murray* and *Bateman*.

By

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon reſpondents.

By that act it is provided, that in all caſes of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, by neglecting or refuſing to renew after the landlord has demanded the fine, courts of equity ſhall relieve upon an adequate compenſation being made. It profeſſes to provide for leaſes for *lives*. What are leaſes for lives within the fair and equitable conſtruction of the ſtatute? It is ſaid a leaſe for 99 years, determinable upon lives, (as this is), is not a leaſe for lives. It is true, that at law it is not a leaſe for lives, for it is but a chattel; but what is it in ſubſtance and equity? I ſay it is in point of equity and ſubſtance, as to this matter, and the relief to be granted, as much a leaſe for lives, as a leaſe for lives at law; for what is it? It does not depend upon the number of years, but drops with the lives, and therefore this is a caſe of a leaſe *for lives*, within the ſtatute. That act provides expreſsly that in every caſe of mere neglect, where there is no fraud, no dereliction by the tenant, equity ſhall relieve. Let us then conſider the preſent caſe: the original leaſe was an old one, made in the year 1660, under which there has been an enjoyment for 127 years: it was determinable upon the fall of three lives, with a covenant which I ſuppoſe the ſame with that which your lordſhips have heard ſo much of. The original leaſe itſelf is not in being, nor is that to be wondered at; a renewal was executed in 1717, nor has this been produced, but that may eaſily be accounted for; the old leaſes were probably given up upon the execution of new ones. The only leaſe now in being is one made in 1739; it contains a covenant, which is a

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon reſpondents.

very ſingular one, and does not deſerve much commendation; it merits the character which has been given to it at the bar, of being the production of a ſhallow underſtanding, much caution, and great perplexity. The parties themſelves ſeem to have thought it deſerved very little attention, and to have conſidered it as a covenant for perpetual renewal. Since this leaſe is a leaſe for lives within the ſtatute, fairly and equitably; the ſecond point is, Is there a covenant for perpetual renewal? As to this there has been much diſagreement; I mean the counſel at the bar have much diſagreed about the conſtruction of this covenant. But how have the parties themſelves conſidered it? The leaſe executed in 17 9, begins with a recital of the original leaſe, as containing a covenant for perpetual renewal. Had they, at that time, any notion that a ſurrender within twelve months by the tenant was neceſſary, and that if the landlord did not accept the ſurrender, the term ſhould become abſolute for the reſidue, diſcharged of all covenant for renewal? No: they looked to this; they, *both* the tenant and Mr. *Bellingham Boyle*, conſidered the leaſe as a perpetual intereſt; for in 1740 a life falls, and then what is done? Why, nothing—it reſts in *neglect* on both ſides till 1749—for I ſee no fraud; but that matter I ſhall conſider preſently.—In 1749 a fine is paid, and a receipt given, and a life named; and ſo it goes on without the formal execution of a renewal. They conſidered it then as a perpetual intereſt: but it is ſaid Mr. *Boyle* was in error; that he was an indolent man, and ignorant of his tenant's title.

See

See how that was: from 1749 to 1760, it goes on in the ſame way; in that time it may reaſonably be ſuppoſed that Mr. *Boyle* might have been waked, and might have looked a little into his affairs. In 1760 another life dies; the tenant comes four years after; another fine is paid, and another life named in the ſame manner as before, without any renewal being executed: and I do believe that more renewals of leaſes of this kind have been made merely by the payment of the fine, and a nomination of a new life, than by the execution of new leaſes; tenants in general remain ſatisfied with this equitable ſecurity of their titles; and equity will conſider that as done which ought to have been done. Thus it goes on till Mr. *Boyle*'s death in 1771: in that year another life falls; in 1774 the tenant goes to the agent, names a life, pays the fine, and takes a receipt nominating the life, as he had done before; then this point concerning renewal of leaſes came to be ſomewhat talked of, and Mr. *Boyle*, the preſent appellant, writes to his agent to return the fine that he had received, (by the bye, a receipt from an agent that has been uſed to receive, is as valid as one by the principal;) to this the tenant agrees, he takes back the fine, and gives up the receipt, conſenting that his claim ſhould undergo a fair diſcuſſion; in my opinion, he acted very candidly, and very honourably. Then comes this queſtion, is there a covenant for perpetual renewal? The covenant is a very ſtrange one; but the leaſe ſeems to have been conſidered by the parties as a perpetual intereſt. It is a caſe of mere neglect; the landlord does nothing; the tenant does nothing; it is a caſe of ſupineneſs on both ſides.

But

HOUSE of LORDS.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

But it is ſaid the covenant is in particular words, and that the tenant is bound to ſurrender conditionally within twelve months after the fall of a life. What! ſhall the leaſe be abſolutely void, merely for want of the ſurrender? Is that a caſe not relievable in equity? The landlord has received his rent from time to time. I do not deny, that at law, the term may be gone; but it is admitted at the bar, that upon a bill properly framed, a court of equity could ſupply the want of a ſurrender; ſo that it is a caſe where a court of equity could relieve. There is in the bill a prayer of general relief, and a court of equity will adapt its relief to the circumſtances of the caſe; it would conſider the tenant as much relievable by ſupplying a ſurrender, as by decreeing a renewal in common caſes. As to the term's being at an end, it is quite out of the caſe, in the conſideration of a court of equity.

Has there then been any fraud, any dereliction, or demand by the landlord, and refuſal by the tenant? It has not been ſaid that there has been any dereliction: but it is ſaid that there has been fraud on the part of the tenant. This is a caſe particularly circumſtanced, and more favourable for the tenant than any that I remember; the three fines have been paid, the lives nominated, and all of them are living; in two caſes the fines have been received. It is ſaid there is fraud; where is it? It is ſaid no intereſt was paid in 1749, upon the payment of the fine, conſequently it is ſaid it muſt be inferred, that the time of the death of the *ceſtui-qui-vie*, was fraudulently concealed from Mr. *Bellingham Boyle*, a gentleman reſiding in the neighbourhood!

to

to this I ſay, that fraud is never to be preſumed in any caſe: beſides, what does the act ſay? "Where no fraud *appears* to have been intended:" now has any *appeared* here? Then, again, it ſays "if no circumſtance of fraud be *proved*"—is this a caſe where fraud has been *proved?* How is the next caſe? A life falls in 1760, the fine is not paid till 1765, and then only 3l. is paid for intereſt, whereas it ought to have been 4l. this is fraud! Now I believe the tenant had a year to renew in; but even ſuppoſe it ought to have been 4l. we all knew Mr. *Bellingham Boyle* to have been of a very generous and liberal diſpoſition, and as likely as any man to ſay to his tenant, "I will not inſiſt on the intereſt, I am ſatisfied with the fine;" at leaſt, this is rather to be preſumed than that there was any fraud. Afterwards upon the fall of a life in 1771, the tenant goes to the agent or ſteward and pays the fine; this is fraud! it is ſaid he ought to have gone to the principal: now who was more likely to know the affairs of the eſtate, the agent who tranſacted the buſineſs of it, or a young gentleman juſt come into the poſſeſſion of his property? I think if the tenant intended fraud, he would rather have gone to the principal, who was leſs likely to know his title, and would probably have been willing to receive the money.

The covenant on the part of the landlord is, that he will renew; but if he refuſes there is a penalty; in ſuch caſes the party may elect to have a ſpecific performance of the covenant.

I am ſure the counſel who made the objections on the ground of fraud, would not have made uſe of them, if he thought he had other ſufficient ground; ſo that the argument of fraud

HOUSE of LORDS.

Boyle, appellant, Lyfaght and Purdon adminiſtrators of Wrixon, reſpondents.

fraud implies a want of ſomething more material to rely on.

It is ſaid the leaſe is gone for want of a ſurrender; which may as much be ſupplied by a court of equity, as a renewal decreed. It is ſaid the bill is not framed for it; but where a party comes into a court of equity, and ſtates his whole caſe, praying the aid of the court, the court will not ſit idle, but will decree the party that relief which is ſuited to his caſe. It is becauſe the term is gone at law, that it is neceſſary and proper to come into a court of equity, and upon that ground the court will afford relief.

It is ſaid a caſe came before me of *Freeman* v. *Boyle*, on this very covenant, in which I refuſed relief: I do recollect that determination; it was on the 10th of *June* 1780; the time is particular; the reverſal of my decree in *Murray* and *Bateman* was in 1779: in *June* 1780 no bill on this ſubject was even brought into parliament; nor did any man know that ſuch a bill would ever have been brought in; I find by the journals that it came up from the Commons the 14th of *Auguſt* 1780, and received the royal aſſent the 7th of *September*. The leaſe being forfeited, it ſtood as if all the lives had dropped, ſo came within one of the caſes put by the Lords in that of *Murray* and *Bateman*; ſo, as the equity ſtood then, it was the equity of the land; I could make no other decree. But though the act had never paſſed, after the appellate juriſdiction had been reſtored to this houſe, I ſhould have very little doubt of making the ſame decree that I had made in *Murray* and *Bateman*; for then it would have come before judges acquainted with the uſage

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of the kingdom, and the circumſtances of this kind of tenure.

House of Lords.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

It is ſaid the determination of the court of Exchequer, on the plea ſide, on this covenant in the caſe of *Leſſee of Freeman* v. *Boyle*, contradicts their opinion upon it on the equity ſide in this caſe. It is ſaid they decided in that caſe that the tenant, after the landlord had refuſed to renew, had an abſolute intereſt at law for the reſidue of the term, which ſuppoſes that the landlord had it in his option to renew or not; but that their decree here is founded on the principle that he had no option, but was bound to renew. But ſee what that caſe on the law ſide was: I am informed that it was an ejectment on the title, brought by the tenant againſt the landlord, who had got into poſſeſſion; the defendant demurred to the plaintiff's evidence; the barons thought that it was ſufficient to go to a jury, to ſhew that there had been a ſurrender within the time preſcribed by the condition, or that the landlord had prevented it, they accordingly over-ruled the demurrer. I think they decided very properly; they then ſat as a court of law; but when it comes into a court of equity, and they ſee that in fact no ſurrender had been made, and have all the circumſtances laid before them, they very properly ſupply the want of a ſurrender, and decree a renewal; ſo that they acted very conſiſtently with their judgment on the law ſide.

If a leaſe for years were made, and nothing ſaid about lives, I do not think that it would come within the act; but if a leaſe were made for 31, 99, or any number of years, though not depending upon lives, if it were renewable

House of Lords.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

for ever, I think it would come within the *old equity*.

In my opinion the barons in this caſe have acted very properly; I therefore think that the decree ſhould be affirmed.

Lord *Pery*—I concur with the noble viſcount in every point, except in this that the equity of the tenant to have relief is a *local equity*. It is a general principle of equity, to relieve againſt a mere lapſe of time. But as the landlord ſuffered an injury by the tenant's neglect to renew in time, it was neceſſary to make him compenſation. The only difficulty was in ſettling what that compenſation ſhould be. That of ſeptennial fines, eſtabliſhed by Lord Ch. Baron *Gilbert*, was more than adequate; for at that time the price of an annuity for life was ten year's purchaſe. The decree in that caſe was affirmed by the Lords of *England*, and by numerous determinations afterwards that rule was eſtabliſhed as the law of this land. I cannot help expreſſing my ſurpriſe, that in the caſe of *Murray* and *Bateman*, the Lords of *England* ſhould overturn the known ſettled law in ſuch caſes. That deciſion made it neceſſary to paſs the tenantry act, to prevent the confuſion that was likely to ariſe in this kingdom, from that determination. That act was a very proper one at the time, but as the juriſdiction is now reſtored to this houſe, it is now unneceſſary.

Lord *Earlsfort* coincided with the learned viſcount on the woolſack. His lordſhip obſerved, that this caſe afforded an opportunity to that houſe of priding themſelves in the conſideration that, if the appellate juriſdiction of this

this kingdom had remained in its original and conſtitutional ſituation, there would have been no occaſion to paſs the tenantry act. That from the determination of that great man, Lord Ch. Baron *Gilbert*, in the caſe of *Sweet* and *Anderſon*, down to the reverſal of the decree in *Murray* and *Bateman*, perſons having ſuch leaſes, were conſidered to have perpetual intereſts, and not depending on the ſtrict terms of the renewal clauſes. The leaſe then under their lordſhip's conſideration, had always been ſo conſidered by the parties, and the proviſo and covenant in it, as a covenant for perpetual renewal. His lordſhip ſaid, that the proviſo and covenant, however perplexed, ſeemed nevertheleſs capable of a rational conſtruction. The The meaning he took to be this, that the tenant ſhould apply for a renewal within one year after the fall of a life; and for that purpoſe, tender a ſurrender of the old leaſe, together with a draft of a new one: that as this time was allowed to the tenant, ſo on the other hand, the landlord was to have three months to execute the renewal; and if he did not, then the ſurrender was to become void, that the tenants intereſt might not be prejudiced by it, but continue under the former leaſe, as if no ſurrender have been made; ſo that his legal eſtate not being diveſted, he might be left to ſeek a renewal, ſtanding in the ſame ſame ſituation as if he never had made a ſurrender.

HOUSE of LORDS.

Boyle, appellant, Lytaght and Purdon adminiſtrators of Wrixon, reſpondents.

Lord *Farnham* declared his concurrence, and reprobated the reverſal of the decree in *Murray* and *Bateman*. He obſerved, that the Lords of *England* had not the excuſe to plead that

House of Lords.

Boyle, appellant, Lyſaght and Purdon adminiſtrators of Wrixon, reſpondents.

that they were ignorant of the eſtabliſhed law of this kingdom in ſuch caſes; for they had themſelves ratified and confirmed it in *Sweet* and *Anderſon*, and many ſubſequent caſes, which had come before them.

Decree affirmed.

END of the FIRST PART.

HOUSE OF LORDS. 1787.

Wedneſday 2d. May, 1787.

The Rev. GUY ATKINSON, Doctor of Divinity and another Appellants.

WILLIAM PILSWORTH and others Reſpondents.

Atkinſon *againſt* Pilſworth.

ANTHONY ATKINSON, Barriſter at Law, father to the appellant *Guy*, being ſeiſed in fee of the lands in queſtion, by indenture bearing date the 15th day of *June*, 1715, demiſed them to *Joſeph Rea*, to hold to him his executors, adminiſtrators, and aſſigns, for and during the natural lives of the ſaid *Joſeph Rea*, *Rebecca Rea* his wife, and *James Eccles*, and the ſurvivors and ſurvivor of them, at the yearly rent of 20*l*.—And it was therein covenanted and agreed by and between the ſaid parties, that the ſaid *Joſeph Rea*, his executors, adminiſtrators, and aſſigns, ſhould or might "*from time to time, and at all times* "after the death or determination of any of "the ſaid lives, renew his leaſe by putting in "any other life in the room and place of the "deceaſed, paying one pepper corn for ſuch "renewal, provided the ſaid renewal be made "or tendered to be made within ſix months

The covenant to renew in this caſe, held to be a covenant for perpetual renewal.

1787. HOUSE of LORDS. Atkinſon *againſt* Pilſworth.

" after the life" ſhould drop—And the leſſee covenanted for himſelf, his executors, adminiſtrators and aſſigns, quietly and peaceably, to leave and yield up the premiſes at the ſurrender, forfeiture, or other ſooner determination, or expiration of the ſaid leaſe, to the leſſor, his heirs and aſſigns. By virtue of this leaſe *Joſeph Rea* entered and continued ſeiſed till the time of his death in *April* 1741. Upon his death *Rebecca* his widow, and deviſee (in truſt for his children) entered and became ſeiſed, and on 30th of *April*, 1742, obtained from the ſaid *Anthony Atkinſon*, a renewal of the leaſe by ſubſtituting *Daniel Rea* in the place of *Joſeph Rea* deceaſed. By that indenture, after reciting the original leaſe and the covenant for renewal therein contained; the ſaid *Anthony*, " *in purſuance and execution of the ſaid covenant for renewal in the ſaid original leaſe contained*," did demiſe to the ſaid *Rebecca*, her executors, adminiſtrators and aſſigns, the premiſes for the lives of the ſaid *Rebecca*, *James Eccles*, and *Daniel Rea*. And the ſaid *Anthony* did, " for himſelf, his heirs and aſ-
" ſigns, covenant and agree, to and with the
" ſaid *Rebecca*, her executors, adminiſtrators,
" or aſſigns, that in caſe the ſaid *Rebecca*,
" her executors, adminiſtrators or aſſigns,
" ſhall be minded *by virtue of the covenant in*
" *the ſaid original leaſe contained*, to have ano-
" ther life added in lieu of the life that ſhall
" happen to fall, *and ſo to make them up three*
" *lives again;* that then the ſaid *Anthony At-*
" *kinſon*, his heirs and aſſigns ſhall *from time*
" *to time*, at the reaſonable requeſt of the ſaid
" *Rebecca Rea*, her executors, adminiſtrators
" or aſſigns, inſert ſuch life as the ſaid *Re-*
" *becca*,

1787.
HOUSE of LORDS.
Atkinson *against* Pilsworth.

" *becca*, her executors, adminiſtrators, or aſ-
" ſigns ſhall name, *ſo as to make them up three*
" *lives again, purſuant to the clauſe or covenant*
" *for renewal in the ſaid original leaſe mentioned.*"

Upon the death of *Anthony Atkinſon*, the inheritance deſcended to the appellant *Guy*. Afterwards *James Eccles*, one of the *ceſtui que vies* in the original leaſe, and alſo in the renewal, and *Daniel Rea*, the life that had been inſerted in the renewal in the place of *Joſeph Rea*, died about the year 1775; and the reſpondents in whom the leaſe had veſted by meſne aſſignments, applied to the appellant to renew the leaſe by ſubſtituting two other lives in the room of thoſe deceaſed, which was refuſed; whereupon the reſpondents filed their bill in Chancery the 2d of *February*, 1776, to compel a renewal. After the filing of the bill, *Rebecca Rea*, the laſt *ceſtui qui vie*, died, and the bill being amended 12th of *June* 1781, prayed a renewal for three new lives named. The appellants in their firſt anſwers admitted the ſaid covenant to be a covenant for perpetual renewal; but in their amended anſwers they alledged that they had at firſt miſtaken the meaning of the covenant in the original leaſe, and inſiſted that it did not amount to a covenant for perpetual renewal, but was a limited covenant to ſubſtitute new lives in the place of the original *ceſtui qui vies* only.

This cauſe was heard on the 17th and 18th of *February*, 1785, before Lords Commiſſioners, who decreed that the reſpondents were entitled to a renewal. Upon a re-hearing before the Lord Chancellor, his lordſhip on the 18th of *June*, 1785, was pleaſed to affirm the de-

1787. HOUSE of LORDS. Atkinſon *againſt* Pilſworth.

cree, from which the preſent appeal was brought.

This cauſe was argued on *Friday* 27th *April*, by Mr. Attorney General, and Mr. *O'Neil* for the appellants, and by Mr. *Wolfe* and Mr. *M. Smith* for the reſpondents, when the Lord Chancellor propoſed that the following queſtion ſhould be put to the Lords the Judges.

Whether in the caſe of the death of *Daniel Rea*, the new life inſerted in the renewed leaſe of 1742, the other two lives being alive, the leſſor and covenantor, *Anthony Atkinſon*, was bound to make a renewal and inſert another life inſtead of ſaid *Daniel*, ſo as to make the lives up three lives again. And whether in this caſe taking the whole together, the covenant for renewal was or was not a covenant for a perpetual renewal?

This queſtion was accordingly put to the Judges, and on the 2d *May*, Lord Chief Baron *Yelverton* delivered their opinion in the affirmative on both points as follows:

My Lords, I have conferred with my brethren, and they found their opinion on the circumſtances of the caſe, and on certain fixed rules of conſtruction which I ſhall mention: We conceive it to be a rule of conſtruction of known and approved uſe; that no words in any deed or inſtrument, which may have a ſignificant and operative meaning, without injuring the natural and obvious ſenſe of any other part of the deed or inſtrument, ſhall be rejected as nugatory and redundant. We alſo conceive it to be another eſtabliſhed rule, that when two or more deeds or inſtruments act upon one and the ſame ſubject matter, they ought to be conſidered

1787. HOUSE of LORDS. Atkinson *against* Pilsworth.

sidered and construed as one and the same instrument; and each is to be made auxiliary to the other, in order to come at the true meaning of both, in like manner as one part of the same deed or instrument ought to be made auxiliary to the other, in order to come at the true sense and meaning of the whole. We are further of opinion, on the authority of the cases cited at the bar, that when any deed or instrument is of doubtful or ambiguous construction, one of the best ways of explaining it is by referring to the act of the parties to that deed or instrument.

In this case there are two deeds to be taken into consideration; the deed of lease of 1715, and the renewal in 1742, to each of which *Anthony Atkinson* the lessor was an executing party; in each of them there is a covenant certainly of dark and intricate phrase, of doubtful and ambiguous sense. Two constructions of these covenants have been contended for; and two only; one by the appellants, the other by the respondents. The appellants contend that the true meaning of these covenants is, that the lessees were to have a lease of the lands in question, for the three lives renewed in the lease of 1715, and for three other lives to be successively inserted in their room. I shall first consider the construction contended for by the appellants, and see whether that be the true one, or will bear the application of the rules I have mentioned; if not, then certainly the construction contended for by the respondents, if it will stand the test of those rules, must prevail. Now if the appellants construction be the true one, it may be fully satisfied, though we should omit out of the first covenant the words, "at all

1787. HOUSE of LORDS. Atkinſon *againſt* Pilſworth.

all times," and out of the ſecond covenant the words, "ſo to make them up three lives again," and the words further down in the ſame covenant, "ſo as to make them up three lives again;" for take the covenant in the leaſe of 1715 without the words which I ſay may be omitted, the leſſee will be entitled to a renewal of the firſt three lives, as fully and clearly as if they were inſerted; for omitting thoſe words, the covenant will run thus, "and it is covenanted and agreed that the ſaid *Joſeph Rea*, his executors, adminiſtrators, and aſſigns, ſhall or may, from time to time, after the death or determination of any of the ſaid lives, renew his leaſe by putting in any other life in the room or place of the deceaſed." It muſt ſtrike every one that the leſſee would, if the covenant had run in this manner, be entitled to every thing the appellants conſtruction would give him. It may be ſaid that the words *from time to time* mean nothing more than that the leſſee ſhall have the firſt three lives renewed ſucceſſively as they fall. But though it ſhould be admitted that this is the true ſenſe of theſe words, yet we ſhall be at a loſs without reſorting to the reſpondents conſtruction what to do with the words *and at all times*; the juſt and obvious force of which is, to convey the idea of perpetuity. I will admit that *time* is a word of indefinite ſignification. It may either mean time without reference to beginning or end, as *Eternity*; or it may mean time with reference to a certain beginning, but without reference to any end, as *from henceforth for ever*; or it may mean a given portion of time, which has both beginning and end, as *from henceforth during three lives*. In this covenant, the

1787.
HOUSE of LORDS.
Atkinson *againſt* Pilſworth.

the words at all times muſt either ſignify *from henceforth for ever*; or in the limited ſenſe contended for by the appellants, *at all times during the firſt three lives*; but if it be doubtful which is the true ſenſe, we are to look, according to one of the rules which I have mentioned, to the acts of the parties themſelves, and refort, according to another of theſe rules, to the covenant in the ſecond deed, and make the one auxiliary to the other. If the words *at all times*, mean only at all times during the firſt three lives, what is to be done with the words in the ſecond covenant, *ſo as to make them up three lives again? Anthony Atkinſon* was a party to that Covenant; he was by profeſſion a barriſter; he was probably the perſon who penned both covenants, and it can hardly be ſuppoſed that he meant in the ſecond covenant to depart from the firſt, at the very moment he recites the firſt, and profeſſes to purſue it; and yet if the original covenant meant to give a right of renewal for three lives only, the ſecond covenant would not be purſuant to the firſt, as it is recited to be, but would depart from it, and would give a right of renewal, which in point of duration would be narrower or more extended: purſuant to the firſt covenant it could not be, if that covenant meant to give a right of renewal for three lives only, becauſe if *Daniel Rea*, the new life named in the renewal of 1742, ſhould happen firſt to die, (which it ſeems turned out to be the caſe) then the three lives named in that renewal, could never be made three lives again; for if a new life were to be inſerted in the room of *Daniel Rea*, it would be going beyond the three lives intended by the original leaſe; and

then

1787. HOUSE OF LORDS. Atkinson *against* Pilsworth.

then to satisfy the appellants construction of the second covenant, the words in that covenant, and "so to make them up three lives again," and the words, "so as to make them three lives again," must be rejected as superfluous, contrary to one of the rules I have mentioned. But it is said that these last words may be retained and satisfied, if construed to restrain the first, and instead of giving a right of renewal of three lives, to give a right of renewal of two only, and so to make them up three lives again, that is, once more. If you adopt this construction, you must suppose that the parties intended to depart from this first covenant, when they both profess to pursue it. You must consider the two covenants at variance with each other, instead of making them auxiliary in order to come at the true sense of both. You must suppose that *Rebecca Rea* meant to limit the duration of the lease, at the very instant when she came for a renewal of it, and you must reject as utterly senseless and superfluous the words in the second covenant "from time to time."

It is therefore impossible to satisfy all the words of the second covenant, or to reconcile it with the first, without extending the right of renewal, beyond the construction contended for by the appellants, in short without construing both covenants to give a right of renewal for ever, which is the construction contended for by the respondents.

The words in the first covenant "from time to time and at all times," apply to some act to be done, it is therefore fair to transpose them, and apply them to that act; then the covenant will run thus: "that *Joseph Rea*, shall from time to time, and at all times

1787.
HOUSE of LORDS.
Atkinſon *againſt* Pilſworth.

times renew the leaſe," after the determination of any of the lives. Again in the ſecond covenant; ſuppoſe the words "from time to time," applied to every member, of the ſentence of which they make a part. They were certainly meant to operate upon ſome verb denoting an act to be done by one or both of the parties; but in the place where they ſtand, they are removed from every verb; bring them down to the firſt which occurs, and the ſentence will read thus, "the ſaid *Anthony Atkinſon*, ſhall from time to time, inſert ſuch life, &c." How is he to inſert it? bring down thoſe words again, and affix them to the ſecond verb, and it will run thus, "ſo as from time to time to make them up three lives again." This I apprehend is not only fair but right, and warranted by the known rules of conſtruction, and if ſo, there can be but little doubt that the intent was that the intereſt ſhould continue for ever. *Anthony Atkinſon* has put that conſtruction upon it; the family have put that conſtruction upon it; their firſt anſwer admitted that it was a covenant for perpetual renewal. I do not ſay that a party is bound by ſuch admiſſion, but it ſhews what conſtruction was generally received in the family. We are therefore clearly of opinion, that the leſſor was bound to make a renewal from time to time, and at all times, ſo as to make up three lives again, and that the covenant ſhould be conſidered as a covenant for perpetual renewal.

Decree affirmed.

HOUSE

HOUSE OF LORDS.

Saturday, 5th. May, 1787.

1787. GAMALIEL FITZGERALD MAGRATH, Esq; Appellant.

Magrath *againſt* Lord Muſkerry.

Right Honourable ROBERT TILSON, Lord Baron MUSKERRY, and others Reſpondents.

In this caſe, 1ſt as coming under the deciſion of the lords of *Great Britain*, in the caſe of *Murray* and *Bateman*, and within the proviſo in the tenantry act. 2dly. In conformity to a decree of the Exchequer, wherein it was held, that after the fall of all the lives, the tenant had no right to a renewal. 3dly. Upon the ground of the tenants miſconduct, Appellant's bill for a renewal was diſmiſſed in Chancery. That decree affirmed in *Dom. Proc.*

THIS was an appeal from a decree of the court of Chancery diſmiſſing the appellants bill for a renewal of a leaſe of the lands of *Ballyneety*, *Clogheen* and *Ards*, in the county of *Limerick*. The circumſtances of this caſe were in ſubſtance as follow: By articles dated the 10th of *April*, 1712, it was agreed that *Thomas Deane*, Eſq; in conſideration of 200*l.* to be paid to him by *James Butler*; ſhould demiſe to him thoſe lands for three lives, with a covenant for perpetual renewal, at the yearly rent of 5*s. per* acre, a fat hog at Chriſtmas; and a half year's rent as a fine upon each renewal. *Thomas Deane* afterwards agreed, that the rent ſhould be reduced to a groſs rent of 65*l.* yearly, and the renewal fine to 20*l.* Notwithſtanding this, he was obliged to file a bill to compel a ſpecific execution of the agreement; and on the 20th of *November*, 1713, he obtained a decree in the court of Exchequer, and it was referred to a Baron to ſettle the draft of the leaſe. The draft ſo ſettled was, after exceptions taken, confirmed. In conſequence

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

conſequence of which Mr. *Deane*, by indenture dated the 19th of *November*, 1714, demiſed thoſe lands to *James Butler*, his heirs and aſſigns, for the lives of *Jordan Butler*, *Henry Butler*, and *Daniel Webb*, and the lives of ſuch other perſons as ſhould be thereafter nominated in the place of the *ceſtui qui vies* then in being, or thereafter to be nominated, ſubject to the limitations and conditions therein mentioned, at the clear yearly rent of 65*l.* and a fat hog at Chriſtmas, or 10*s.* in lieu thereof, at the election of *Thomas Deane*, his heirs and aſſigns. The leaſe contained a covenant on the part of the leſſor for perpetual renewal within twelve months after the fall of a life, upon payment of all rent and duties in arrear, and a renewal fine of 20*l.* with a negative proviſo, that if ever the ſaid *James Butler*, his heirs or aſſigns, ſhould, without lawful impediment, fail, for twelve calendar months after the fall of any of the *ceſtui que vies*, then, or thereafter to be nominated, which ſhall firſt happen to die, to name another life in the place of the life ſo dying, and to pay or tender the renewal fine, and all rents and duties then due; then the ſaid *Thomas Deane*, his heirs and aſſigns, ſhall not at any time afterwards be obliged to renew, and the leaſe then in being ſhall continue, without farther renewal, only during the life and lives then in being and no longer; and that from the death of the ſurvivor of them, that leaſe, and all others made in purſuance of the covenant for renewal, and every clauſe article &c. therein contained, notwithſtanding that covenant, ſhall from thenceforth ceaſe, determine, and be utterly void to all intents and purpoſes.

In

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

In 1721, *James Butler* mortgaged his eſtate in thoſe lands to *William Tubbs* for 500*l.* after which *Jordan Butler* one of the *ceſtui-qui-vies* died. In Eaſter term 1724, *Tubbs* the mortgagee filed a bill againſt *James Butler* and *Thomas Deane*, for an account and foreclosure as againſt the former, and for a renewal as againſt the latter, and obtained a decree on the 4th of *July* 1726, under which the premiſſes were ſold for 1880*l.* and by deeds dated the 16th and 17th *March* 1726, conveyed to *William Naſh* who had purchaſed in truſt for *Terence Magrath*, the appellant's grandfather. *Thomas Deane* by indenture dated 23d *September* 1727, in conſideration of the fine and in purſuance of the covenant, renewed the leaſe to *Terence Magrath*, by inſerting the life of *James Butler* in the place of *Jordan Butler*. In 1740 *Henry Butler* one of the original *ceſtui-qui-vies* died, and *Mathew Deane* who then had the reverſion, by an inſtrument dated 7th *October* 1741, acknowledged the receipt of the renewal fine from *Terence Magrath*, and the nomination of *John Magrath* the ſon of *Terence*, and covenanted that *Terence* and his heirs ſhould hold and enjoy the lands for the lives of ſaid *James Butler*, *Daniel Webb* and *John Magrath*, ſubject to the rents, covenants, &c. in the original leaſe. *Terence Magrath* died in *July* 1743, and his ſon *John* became ſeiſed. *James Butler* one of the *ceſtui-qui-vies* died on the 5th of *February* 1761. No life was named in his place. *John Magrath* the tenant, another of the *ceſti-qui-vies* died on the 4th of *January* 1770. To excuſe his laches in not renewing upon the death of *James Butler*, it was alledged that he was infirm

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

firm and incapable of tranſacting buſineſs for many years before his death, but this was attempted to be ſupported only by the evidence of one witneſs, who depoſed that *John Magrath* for ſeveral years before his death was ſickly, being afflicted with the gout and palſy and was inattentive to his affairs. By the teſtimony of another witneſs (who admitted that he was almoſt conſtantly afflicted with the gout) it appeared that he was perfectly capable of tranſacting buſineſs 'till within a very ſhort time before his death, and in this he was ſupported by another witneſs who had been a long time tenant to *Magrath*, conſtantly paid him his rent, and tranſacted buſineſs with him about ſix weeks before his death. The appellant is the ſon and heir of *John Magrath*, and about midſummer 1770, was twenty years of age. On the 4th of *December* 1773 General *Daniel Webb* the laſt *ceſti-qui-vie* died. On the 6th of *June* 1775 an ejectment on the title brought by the reſpondent (then Sir *Robert Deane*) was ſerved, and on the ſame day the appellant nominated to the reſpondent three lives to be inſerted in a renewal, and propoſed to pay him renewal fines with intereſt, delivering at the ſame time an eſtimate of the fines and intereſt amounting to £108-4, and the names of the lives. The reſpondent refuſed to accept the fines and make the renewal, conſidering the leaſe as forfeited. On the 30th of *June* 1775, the appellant filed his bill praying an injunction, and a renewal of the leaſe.

It was ſtated in the bill that in 1731 *Terence Magrath* had mortgaged his eſtate in the premiſſes, and that this mortgage was afterwards aſſigned

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

aſſigned to Judge *Marſhall*. It was contended that the original leaſe had been handed over to the mortgagee, and had never ſince been in the tenant's poſſeſſion, ſo that he was ignorant of the lives named therein. But the only evidence read to this was that of Sir *William Oſborne*, who depoſed that he believed the appellant could not produce to him the original leaſe or any part of it; for that the ſaid leaſe or a counterpart thereof was in his (the deponent's) houſe in *Dublin* as he believed, having been delivered to him by the executor of Judge *Marſhall*, amongſt whoſe papers he believed it was found, and that it has been in deponent's poſſeſſion or power 6 or 7 years, and that it was in *Marſhall*'s poſſeſſion for ſeveral years before his death, and that it came into Mr. *Marſhall*'s hands as mortgagee. The bill ſtated that on *John Magrath*'s marriage, a ſettlement was made under which the appellant took a *quaſi* eſtate tail, and that upon his marriage in 1774, there was a reſettlement of theſe and other lands, in the common ſtrict form.

On the 21ſt of *July* 1775, the reſpondent applied for a *Dedimus* to take his anſwer, without an injunction; and upon hearing counſel on both ſides it was ordered, that upon the appellant's giving judgment at law, and paying the rent one half year under the other pending the cauſe, and giving ſecurity for the meſne rates, an injunction ſhould be awarded 'till the hearing or further order; and it was ordered that the appellant ſhould ſpeed his cauſe. In purſuance of this order the appellant gave conſent for judgment on the ejectment, which was accordingly entered as of Trinity

1787.
House of Lords.
Magrath *against* Lord Muſkerry.

Trinity term 1775. On the 10th of *May* 1776, the reſpondent filed his anſwer, to which the appellant replied without delay, and the reſpondent rejoined. The appellant having neglected to proceed further in obedience to the order of the 21ſt of *July* 1775, the reſpondent on the 13th of *December* 1779 applied for liberty to proceed on the ejectment; and it was ordered, that he ſhould be at liberty to do ſo, unleſs the plaintiff ſhould comply with the terms of ſaid order during the then ſeal; or ſhew that he had paid his rent in purſuance of it: ſtill the appellant prevented the reſpondent from availing himſelf of the order; but on the 27th of *July* 1780, it was ordered that the reſpondent ſhould be at liberty to proceed upon the judgment without further motion, unleſs the appellant ſhould comply with the order of the 21ſt of *July* 1775, in a month. The appellant neglected to comply, and the reſpondent iſſued an *Habere*, and on the 7th of *September* 1780 was put into poſſeſſion. In *October* 1780 appellant proceeded to examine witneſſes. The cauſe was heard on the 8th, 12th, 14th, 15th and 16th of *July* 1783. On the 24th of *November* 1783, Lord Chancellor diſmiſſed the plantiff's bill with coſts. From this decree the plaintiff appealed on the 21ſt of *February* 1787.

Client indebted to his attorney can't oblige him to produce his papers, &c. in court, tho' only for the purpoſe of uſing them there and not to take them out of the attorney's poſſeſſion.

Note, Previouſly to the hearing before the Lords, appellant prayed, by petition, an order that his deeds and papers neceſſary for the hearing, and which had been in the poſſeſſion of his late attorney then deceaſed, ſhould be produced at the bar of the houſe upon the hearing. He did not pray that they ſhould be delivered up to him. In anſwer to this petition,

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

tion, the executrix claimed her right to withhold them 'till the appellant had paid, or given ſecurity for the amount of the bills of coſts due her huſband. Mr. *Attorney General* was heard in ſupport of the petition, but it was refuſed as it ſought to deprive an attorney of the lien upon his client's papers.

This caſe was heard by the Lords on *Wedneſday* the 2d. *Friday* the 4th, and *Saturday* the 5th of *May* 1787. The *Attorney* and *Solicitor General* for the appellant. Mr. *Curran* and Mr. *Emmet* for the reſpondent.

Lord *Chancellor*. My Lords, I riſe rather to furniſh your lordſhips with the principles which governed me in making my decree, than to offer any arguments to induce you to affirm it. It is perfectly indifferent to me which way you decide. I am not at all anxious about the fate of any appeal from a deciſion of mine. On the contrary, it is a great conſolation to me, when ſitting on the bench, to reflect, that if I decide wrong, there is this houſe to rectify my miſtake. The wiſdom of this houſe is ſuperior to that of any individual though ſitting in his judicial capacity, and therefore ought to be exerted without any influence from the opinion of ſuch individual.

A great deal has been ſaid at the bar, which, in my apprehenſion, does not meet the principles upon which I founded my deciſion. As to this leaſe's having been founded on a decree of the Court of Exchequer, that makes no difference. The manner in which it is formed is a circumſtance which ſhews that the courts had not then the ſame opinion of theſe negative covenants, that has been held in more modern times. The Baron who framed it, certainly

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

tainly thought that the negative proviſo was to have an effect, and the decree was made accordingly. But in the caſes that have occurred ſince, Courts of Equity do not ſeem to have much regarded thoſe negative covenants, but only to have looked to this, whether compenſation could be made to the landlord, and whether the tenant had not miſbehaved.

This is a very particular caſe; and the queſtion ariſing upon the act and the circumſtances of the times is very ſerious and of great importance, and which weighed very much with me in my determination. I looked into it, firſt with a view to the tenantry act; where the firſt conſideration is, how Lord *Muſkerry* was circumſtanced at the time of paſſing that act, on the 7th of *September* 1780. Then all the lives were gone; Lord *Muſkerry* had therefore brought an ejectment on the title, obtained judgment, gotten execution, and was on that very day in poſſeſſion of the lands under his title as owner of the inheritance. Under theſe circumſtances he was within the proviſo of the act. That act was made to relieve tenants in caſes of mere neglect, and it is provided, that it ſhould not affect any judgment or decree at that time given or made, or any ſuit inſtituted before the 15th of *May* 1780, and then depending, for the recovery of the poſſeſſion on account of any leaſe not being renewed, &c. Here Lord *M.* had not only inſtituted a ſuit, but had obtained the fruit of it, he had gotten judgment and execution. The law had performed its office. Here (if it could be doubted) it may be proper to conſider an objection that has been made. It is ſaid, that

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

it was not an adverſary judgment: that the proviſo in the act means only adverſary judgments.—It is alſo ſaid that the order, under which the judgment was had, was ſuch as never ought to have been made; ſuch as ought not to have been put upon the party, and ſuch as this houſe would have relieved againſt. I think there is no foundation for that aſſertion. Lord *M.* had brought his ejectment. The tenant had no title whatſoever at law. The landlord ought not to have been delayed at law: and where the tenant cannot make title, the court in every caſe will give the landlord leave to go to trial, unleſs the tenant will conſent to give judgment; for if the landlord is to be delayed 'till the event of a ſuit in equity, his witneſſes may be dead; he may not be able to prove that which he could have proved before. The defendant at law, *Magrath*, filed his bill. There was a motion for a *Dedimus* without an Injunction. It was offered by the counſel for *Magrath* to give judgment at law, to pay the rent in arrear, and give ſecurity for the meſne rates, and to ſpeed the cauſe. The defendant accepted the offer, and the court did no more than is done in ſuch caſes, and an order was made accordingly, by which the plantiff at law was ſtopt from going to trial by an injunction, and the defendant having no title at law, gave judgment and entered into the terms propoſed by his counſel. This was not like caſes of ejectment, where the tenant can make a title; and ſuch an order as this, is agreeable to every day's practice. This is the order that has been arraigned and which it is ſaid would have been relieved againſt. I will be bold to ſay that it would not.—

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

not.——It is ſaid that the judgment was not an adverſe one, and that the act means an adverſe judgment. Now let us examine that matter. How did Lord *M.* begin? He brought an ejectment for the recovery of the poſſeſſion and to turn the tenant out of poſſeſſion, becauſe he, the tenant, had no title. Is that a friendly action? It began adverſely! nothing can be more adverſe. It is ſaid the judgment was by conſent and in conſequence of an order and therefore not adverſe. It is not very material as to this point, whether it was by conſent or not. But the conſent was the conſequence of an adverſe ſuit, and the judgment was to be made uſe of in an adverſe manner, if the tenant ſhould not comply with the terms impoſed on him. If he had not given the conſent for judgment, the court would not have prevented the landlord from proceeding at law, and the conſequence would have been, that he would have obtained judgment and gotten into poſſeſſion, perhaps, much ſooner than he did. To avoid this, the tenant entered into terms offered by his own counſel, and which were the terms on which he was to keep in poſſeſſion. It was fair on both ſides. Judgment was given as of Trinity term 1775. It was to put the landlord into poſſeſſion if the tenant ſhould fail in complying with the terms. He failed in every particular, except in giving judgment, and that he could not help. He did not pay the rent, nor give ſecurity, nor ſpeed his cauſe. In my opinion a tenant who expects aſſiſtance from a Court of Equity, ſhould ſhew himſelf ready to comply with its orders and perform his own undertaking. On the contrary by litigation and various

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

manœuvres he delayed Lord *M.* for five years, 'till the year 1780. 'Till then he never examined his witneſſes, tho' he had but two to examine. What did the reſpondent do? On the 13th of *December* 1779, he obtained an order that he ſhould be at liberty to proceed on the ejectment unleſs the appellant ſhould comply with the terms of the former order, during the ſeal, or ſhew that he had paid his rent. Of this the tenant took no notice. On the 27th of *July* 1780, Lord *M.* obtained an order that he ſhould be at liberty to proceed at law upon his judgment, without further motion, unleſs the tenant complied with the terms in a month. The terms were not complied with, execution was ſued out and poſſeſſion was deliverd on the 7th of *September* 1780. Surely the judgment then became adverſe! Thus the matter ſtood when the act paſſed. Here your Lordſhips will take notice of ſomething very particular. Lord *M.* had not only inſtituted a ſuit, but he had gotten the fruit of it, and got into poſſeſſion on the very day on which the act paſſed. So that Lord *M.* and his caſe were clearly within the exception, and the tenant could have no benefit under the act as it ſeemed to me.

Now let us conſider how far the appellant could have relief, if the act had not paſſed. And here, it is ſaid that the Lords of *England* would have given relief; whereas, if I know any thing of the matter, they moſt certainly would not. At that time the *dernier reſort* was in the Lords of *England*. The laſt determination there on this ſubject had been in the caſe of *Murray* and *Bateman*, and that had declared the equity of the land in the point.

For

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

For when the court of *dernier reſort* pronounce what is the law or equity in any caſe, it ſo far fixes the law and equity in the point that all inferior courts think it their duty to ſubmit to it. The preſent caſe is infinitely leſs favourable for the tenant than that of *Murray* and *Bateman*. That was very particularly circumſtanced. In that caſe there were ſuch a proviſo, covenant and deed as one ſhall ſcarcely ever meet with. The deed was made in the manner and form of a feoffment, the the word *infeoff* is in it. It conſiders it as an abſolute conveyance, tho' it afterwards aſſumes the ſhape which gives it the qualities of a leaſe. Lady *Roſs* and her huſband had lived abroad and returned to *Ireland* a very ſhort time before application was made for a renewal. This application was refuſed, on this ground. Lady *Roſs* inſiſted that her father had purchaſed the tenant's intereſt: and this was inſiſted on ſo ſeriouſly that an iſſue was directed to try that fact, and it was found againſt her; and then ſhe ſet up this defence, that the right of renewal had been forfeited. So that, that was a very ſtrong caſe, and very few caſes, in my opinion, have occurred ſo favourable for the tenant. Notwithſtanding which the Lords in *England* declared that there could be no renewal, and accordingly reverſed my decree.—In the preſent caſe, all the lives had dropt. One in 1761. No application to renew! Another in 1770. No application to renew! Tho' the tenant was then twenty years of age. Nor the leaſt notice taken until Lord *Muſkerry* had brought his ejectment in 1775.—I have a pretty long liſt of caſes determined upon this ſubject; about thirteen.

And

1787. House of Lords. Magrath *againſt* Lord Muſkerry.

And when you minutely look into them, you will find that there was ſcarcely one in which the neglect was not in ſome degree accounted for. In all of them it was attempted.—In one caſe, of *Kane* and *Hamilton* 1776, it was particularly ſtated that leaſes with covenants for perpetual renewal, were very common in *Ireland*; that a great deal of property was held under them, and that tho' it often happened that the tenants neglected to renew, yet the conſtant practice in the Courts in *Ireland* had been to fill up the lives *during the continuance of any one of them*. That idea prevailed in the caſe of *Ryan* and Lord *Clonmore*, which I ſhall preſently mention. It is my firm opinion, and it was at that time, that *Magrath* could have no relief. Lord *Muſkerry* continued in poſſeſſion under his old title, from the year 1780, near two years, 'till 1782, when the juriſdiction of this Houſe was reſtored. He ſtood poſſeſſed, diſcharged, in my apprehenſion, of all equity, as matters then ſtood, and had gained an abſolute title, an abſolute intereſt in the eſtate. In 1780 the tenant was not within the act; and the equity was all that time againſt him. Here now we muſt look at the act and aſk this queſtion. Was it ever thought of that it ſhould change the right, and give a man a title which he had not before; in an inſtant take away the landlord's title and transfer it to his tenant? The exception left the tenant to the equity he then had. Then, I ſay, he had none. Lord *Muſkerry*, were this appeal to prevail, by holding the land, would, inſtead of being the abſolute owner, be made an accountable tenant, not only for the rent, but for what he might have made of the land. What would then

1787.
HOUSE of LORDS.
Magrath *against* Lord Muſkerry.

then be the condition of the landlord who gets into poſſeſſion? If he be to be made accountable for three years, why not for ſeven? why not for ten? Where is the equity to end? The tenant lets him ſtay in thro' vexation, and when he pleaſes, will file a bill to turn him out. Such an idea makes one ſhudder at what may be the conſequences of the determination ſought for by this appeal. Suppoſe in that time Lord *Muſkerry* had wanted to ſettle or mortgage his eſtate, and the title deeds had been laid before counſel. His title would be, under this judgment and execution, according to the old title. The counſel would ſee whether there were any equity in the tenant; and upon this point he would have looked into the caſe of *Murray* and *Bateman*, and then Lord *Muſkerry*'s caſe coming within that deciſion and being excepted out of the act, he could have had no apprehenſion of any title in the tenant from this leaſe. It being excepted and ſubject to the determination of *Murray* and *Bateman*, could he doubt of it? No one could then ſee that the juriſdiction would be reſtored to this houſe. Even when the great work of reſtoring the conſtitution was in agitation, no man knew that the juriſdiction would have been reſtored: and I know many that would have been pleaſed if it never had. They were ſatisfied with that juriſdiction remaining where it was.—Who *then* could foreſee, that there would be no occaſion for the ſtatute to reſtore the old equity of the land? But to proceed—This is a great and ſolemn point, and if it were to be decided in the way contended for by the appellant, it would work a great miſchief. It is ſaid, the exception left thoſe caſes to the old equity.

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

equity. I ſay it left them to the equity that exiſted at the time of paſſing the act. At that time the tenant had no equity which would give him a renewal either in England or in Ireland. This was one of the principles upon which I laid great weight.

But ſoon after the act, there was a caſe in the Exchequer, *Ryan* and Lord *Clonmore*, which was a very remarkable caſe, and weighed very much with me. There a bill was filed for a renewal of two leaſes. The owner had mortgaged to *Pilſworth*, who filed a bill for a renewal. It was found that there was a non-alienation clauſe, and that another tenant had been put in upon the landlord without his conſent. When the court ſaw this, they diſmiſſed the bill *in toto*. Then a bill was filed by *Ryan* the mortgagor: ſays he, I am under different circumſtances from *Pilſworth*; I am the original proprietor, not a ſtranger. I am intitled to a renewal, for I ſtand perfectly clear of the objection from the non-alienation clauſe. The court ſaw, that in one leaſe all the lives were gone, that in the other, one was ſtill remaining. Accordingly, in conformity to what was laid down in the houſe of Lords of England, that where one of the lives was ſtill in being, there was a legal eſtate for the equity to attach upon, they decreed a renewal of the latter, but diſmiſſed the bill as to the former. That caſe determined, that if all the lives were gone, the tenant was not intitled to a renewal; if there was one remaining, he was. Therefore, excluſive of any other reaſon, it would have been ſufficient for my determination, that all the lives were gone. If I had determined otherwiſe, it would be in direct

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

direct contradiction to the determination in the Exchequer; and what were the people of this country to do, if one court of equity were to decide contrary to the other? Uniformity of deciſion is of the greateſt importance. That caſe in the Exchequer underwent the greateſt deliberation, and every caſe of renewal that had been determined was cited. All the caſes I have here, I have extracted from the notes of that caſe of one of the Barons. I never ſaw a caſe where more pains were taken, more judgment and ability ſhewn in diſtinguiſhing the ſeveral caſes; and therefore that determination had the greater weight with me, that I might preſerve an uniformity in the deciſions of the two courts. Among other caſes was that of *Munſel* and Lord *Bleſſington*. There, there was a diſability in the leſſor and his ſon, to execute a renewal till the bill was filed, and the defence made to it was, that the leaſe was void. Another caſe was *O'Hara* and *Burke*, there the leſſor had not only ſold the inheritance, but the renewal fines, ſubject to the tenants right in expreſs words. It was ſaid in the deciſion, that there could be no fines without a renewal, and therefore the purchaſer took ſubject to the renewal by the bargain. Another caſe was that of *Jones* and *O'Neil*. There was a great difference between that and this, in favour of the tenant there. There was an abſolute agreement to renew. The lapſe was waved. The new leaſe had been engroſſed and read over, and the fine was proved to have been actually paid to the agent, who afterwards failed in his circumſtances. Mr. *Jones* went to Armagh, where he broke his leg, and Mr. *O'Neil's* father died before his return,

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

turn, otherwiſe the renewal would have been executed.

Another thing which weighed very much with me, was the conſideration of what the act intended to relieve againſt. It relieves in caſes of mere neglect, where there is no fraud, unleſs there had been a demand and refuſal, which is made at the bar the definition of dereliction. But I think, groſs, wilful, obſtinate, and contentious neglect on the part of the tenant is the proper definition of dereliction. Here the appellant's father neglected to renew. It does not appear that he ever called for a renewal. It is ſaid that he did not know who the lives were. Where does that appear? no where. Sir *William Oſborne* depoſed, that he believed he had ſeen the leaſe amongſt Mr. *Marſhall's* papers after his death. It is made an inference from thence, that the father did not know who the lives were. The evidence was ſo ſlight that I thought there was no ground for that inference. The ſon did not offer to renew, 'till Lord *Muſkerry* brought his ejectment in 1775, and then he thought fit to come and renew. That might have been mere neglect. But let us look to his ſubſequent conduct to explain it. After Lord *Muſkerry* had put in his anſwer, the tenant did not comply with the terms of the order, which as hath been ſaid, was ſuch an order as every court of equity would make in ſimilar caſes. It was not conſonant to a deſire to renew, to lie by ſo long. He did not proceed 'till five years afterwards, when Lord *Muſkerry* obliged him to examine his witneſſes. He then examines two. Does he then proceed? no; he delayed again 'till Lord *Muſkerry* had been in poſſeſſi-

on

1787.
HOUSE OF LORDS
Magrath *againſt* Lord Muſkerry.

on three years, and then in 1783, he endeavours to make Lord *Muſkerry* his tenant, and prays that he ſhall account to him for the profits during the time he was in poſſeſſion.

If you reverſe this decree, the determination of the Court of Exchequer in *Ryan* and Lord *Clonmore* cannot ſtand. That decree after poſſeſſion for a length of time under it muſt be ſet aſide.

If a tenant can behave as the preſent appellant has, in what light does he appear? Does he ſhew that fair conduct which he ought? or is he not rather a litigious man, who is deſirous to keep his landlord out. This is either a dereliction or groſs miſconduct, and amounts to fraud, which is to be taken into the conſideration of a Court of Equity.

We ought to conſider what the conſequence of the decree prayed would be. A tenant after giving judgment by conſent, may permit his landlord to ſtay in poſſeſſion for a number of years. If he have a right to renew afterwards, the landlord cannot ſet the land; but the tenant will come and ſay, "after having been ſo long without your rent, and unable to ſet your land to another, you ſhall account to me for the profits you might have made, and then you will have money to pay me, inſtead of my having it to pay you;" and ſo is the prayer made here at the bar, it is that Lord *Muſkerry* may account for the profits, and that the fines may be deducted.

There is no doubt as to the general doctrine, that where compenſation can be made, and every thing has been fair, and the tenant has done equity for equity, there ought to be relief.

On

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

On theſe grounds, 1ſt. on the grand point, 2dly. on the propriety and neceſſity of preſerving uniformity of deciſion; and laſtly, on the miſconduct of the tenant, I formed my decree. If I have been wrong, it is a conſolation to me, that my miſtake will be rectified.

Lord Viſcount *Pery*.—My Lords, I ſhall firſt mention to your lordſhips what are the principles that govern caſes of this kind; as they were laid down on a former day by the noble Viſcount in the caſe of *Boyle* and *Lyſaght*, (*a*) and in which I moſt heartily concurred. They were theſe, that courts of Equity ought in every ſuch caſe to relieve againſt lapſe of time, where compenſation could be made to the landlord, provided nothing appeared that ſhewed fraud, groſs neglect or direliction on the part of the tenant; alſo that courts of Equity ought to relieve againſt the forfeiture, becauſe the fine is the principal and eſſential object, and the renewal is only to enforce the payment.

Theſe principles your lordſhips can apply to the preſent caſe as well as the ableſt lawyer. It is no more than what juries do every day at *niſi prius*. As to fraud, there is not the ſmalleſt circumſtance of it. It is ſaid, on the part of the reſpondent, that, in the courſe of 34 years, it muſt be preſumed that the tenant knew who the lives were, and when they fell, but concealed it, and neglected to renew. In anſwer to this, it is to be obſerved that the leaſe was mortgaged by the grand-father of the appellant in 1731, and in the mortgage deed it is covenanted that all deeds and other papers ſhould be handed over to the mortgagee. That mort-

gage

(*a*) Antea, 135.

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

gage is at this day in force, and it appeared that the leaſe continued in poſſeſſion of Mr. Juſtice *Marſhall* till his death, and therefore that the father of the appellant had never been in poſſeſſion of it; whence the preſumption is that he did not know who the lives were. But can there be the ſame preſumption in favour of the landlord? the counterpart of the leaſe was in his poſſeſſion. If any fraud is to be preſumed, it is on the part of the landlord. His not applying to the tenant to renew, is rather a ground to preſume fraud in lying by, to ſuffer a forfeiture to incur. That I do not by any means intend to charge upon the reſpondent, but ſurely none can be imputed to the tenant. As to the lapſe of time, it is ſaid in the printed caſe that 34 years had elapſed without any application for a renewal; ſee how that time is made up. The reſpondent would have your Lordſhips believe that there was a default in the tenant. But the firſt life did not drop till the fifth of *February* 1761; the tenant had one year to renew, ſo there was no default till the 5th of *February* 1762. The ſecond life (the appellants father) died in 1770, conſequently but 8 years had elapſed in the father's time. It was ſworn by two witneſſes that he was indolent, diſordered, and paralytic. One witneſs indeed for the reſpondent ſaid that he was only gouty, but be that as it may, there was no evidence to ſhew that he was guilty of any thing but mere neglect. That no fraud was intended appears clearly from the covenant in the marriage ſettlement of 1738, "to renew from time to time." When the father died, which was in 1770, the appellant was under age. By the covenant he had

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

had a year to renew. That would bring it to 1771. From thence to the filing of the bill, only four years elapſed, and it did not appear that he had then the leaſe in his poſſeſſion; ſo that no great neglect is imputable to him on the fall of that life. The laſt life dropt in *December* 1773. Until *December* 1774 there was no neglect, and the bill was filed in *June* 1775, ſo that the whole neglect imputable to this unfortunate family is only 13 years after the fall of the firſt life, four after the ſecond, and after the third only ſix months. There have been many inſtances where the courts have relieved after much longer neglect. The caſe of *Munſel* and Lord *Bleſſington* I have perfectly in my recollection. I was counſel in it myſelf; but I nevertheleſs directed a copy to be taken from the regiſter's notes reſpecting the dates. The original leaſe was made in 1692. The fine to be paid on renewal was 500*l*. That was really an object! The firſt life dropt in 1704, the ſecond in 1729, and as the noble viſcount has ſtated, the landlords were incapacitated to renew till the year 1732. In that year *Charles* Lord *Bleſſington* died without iſſue, and then Lady *Mountjoy* and her ſon (afterwards Lord *Bleſſington*) had power to renew. In 1736, and not till then, a bill was filed, but no proceedings were had on it. In 1751 the laſt life dropt, and an ejectment was brought; and then in 1756 a bill was filed five years after the fall of the laſt life, and the bringing of the ejectment. No caſe could be more litigated than that was, and *Bowes* who was the Lord Chief Baron, decreed a renewal upon payment of fines according to the computation eſtabliſhed in *Sweet* and *Anderſon*. That decree

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

decree was appealed from and affirmed. In that caſe there had been a much greater lapſe of time than in the preſent. The three lives were all gone before the bill was filed, and therefore it is a ſtrong authority to ſhew that where all the lives are dropt, Courts of Equity can relieve as much as if one life had remained. The noble viſcount, to combat, this has cited a decree of the Court of Exchequer, and has ſtated that, as to one denomination there was a decree for the tenant, becauſe one life ſubſiſted; and as to another the renewal was refuſed, becauſe the three lives were gone. I have heard from one who was counſel in that cauſe, that the determination went on a clauſe of non-alienation. A bill had been filed by a perſon who claimed in contradiction to that clauſe; but afterwards when the original tenant took a reconveyance and filed a bill, then the court refuſed to decree a renewal, becauſe they ſaid, the eſtate was gone, and nothing remained to be reconveyed by the mortgagee. If the decree had been made on the ground that all the lives were gone, there ought to have been an appeal. It was contrary to a number of caſes which have been determined here and ratified in *England*. When we ſpeak of the lapſe of time, and of the effect of it, let us attend to the value of things, and that will remove every doubt. The fine was only 20*l.* the intereſt on that, at 6 per cent would be but 1*l.* 4*s.* The value of the lands is perhaps from 300*l.* to 500*l.* per annum. To think that any man in his ſenſes would riſk ſuch a property from fraud in order to ſave 20*l.* or defer paying it to ſave the intereſt which is but 1*l.* 4*s.* is abſurd. In *Munſel* and Lord *Bleſſington*, the fine

1787.
HOUSE of LORDS.
Magrath *againſt* ord Muſkerry.

fine was an object. Here the ſum tendered by the appellant was the utmoſt that Lord *Muſkerry* could be entitled to. The four fines with the intereſt amount to 108*l.* only, and for that ſum the noble lord ſeeks to get an eſtate of about 500*l.* per annum. That would be cruel to the higheſt degree. Arguments have been drawn from the appellant's conduct during the ſuit. I did not think that this could have been relied on ſeriouſly. But let us ſee what this conduct was: The appellant had made the tender on the 6th of *June*, (not ſhortly after the ſervice of the ejectment, as is ſtated in the reſpondent's caſe, but on that very day). On the 30th of the ſame month, the bill was filed. So early as the 21ſt. of *July*, the order was made upon the motion of the reſpondent for a *dedimus* to take the anſwer. By the eſtabliſhed rule of the court, the plaintiff is upon ſuch an application entitled to an injunction of courſe, inſtead of having terms impoſed on him. That rule was not in the preſent caſe obſerved. But an order was made upon the plaintiff to give judgment in the ejectment; to pay the rent due; to give ſecurity for the meſne rates, and to ſpeed his cauſe. It was an order for which I cannot ſee any foundation. If the appellant had applied to the court for any extraordinary favour, it might have been right to put him under terms; but here the defendant applies for a favour, which he not only obtains, but the plaintiff is put under terms, which were the cauſe of all the ſubſequent conduct that is now called litigious. That order, if appealed from, I am convinced would have been ſet aſide. But where does this litigious conduct appear? When that order

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

der was made, there was no ground for that cenſure. *Magrath* gave conſent for judgment immediately. This was the only thing he had in his power to do. The order itſelf took away his credit, and with it the ability of complying with the other parts of it. With the greateſt difficulty he raiſed the ſum of 327*l.* which was five pounds and ſome ſhillings ſhort of the rent due; this he paid to the reſpondent, but ſecurity for the meſne rates he could not give, and on that account Lord *Muſkerry* was allowed to take out execution on the judgment. It is ſaid that that judgment is deciſive. But I ſay to this hour it is not deciſive. Can it be ſaid that a Court of Equity on the hearing of the cauſe, had not that judgment under its controul? The order was ſubject to the Court of Chancery, in which it was conceived, and conſequently the judgment founded upon it, and both are now ſubject to the controul of this houſe.

I have hitherto ſaid nothing of the tenantry act, in order to ſhew that independent of it the appellant is entitled to a decree.

The principle ſo much relied on, is, that the Houſe of Lords in *England* being the *dernier reſort*, the laſt determination there eſtabliſhes the equity of this land. I deny that principle. There can be no doubt that, if there had been then an appeal to the Houſe of Lords of *England*, the Chancellor would have adhered to his former opinion in the deciſion of *Murray* and *Bateman*. But was not the equity of this country as much eſtabliſhed by the determinations of his predeceſſors through a numerous ſucceſſion of caſes? Shall it be in the power of one Lord Chancellor to overturn the equity

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

that had been laid down in a ſeries of determinations, and to ſay that his deciſion laſt given ſhall eſtabliſh the equity of the land? That is a doctrine I deny.

Let us now conſider the act. It is in the memory of many, and in my own particular knowledge, that that law was framed purpoſely to remove the impreſſion that had been made by the opinion of the preſent Lord Chancellor of *England*, in that caſe of *Murray* and *Bateman*. But conſider what was then the ſituation of this country. The *dernier reſort* was then in the lords of *England*. We ſtood in a different relation to *England* from what we do at preſent. It was neceſſary to be on a good footing with the Chancellor of *England*. It was neceſſary to treat him with delicacy. The act therefore was dexterouſly and cautiouſly worded, not to give him offence. It did not impeach his deciſion as wrong, and contrary to the equity of the land; for then we ſhould have been certain that it would be thrown out. The hiſtory of the proviſo is curious. There was no ſuch clauſe in the bill when it paſſed the commons. Great application was made to oppoſe the bill on both ſides of the water. It was uſual in *England* to refer our bills to the Attorney and Solicitor General, and ſome of thoſe Attorneys and Solicitors General, have given them over to a lower claſs of people who made a practice of deriving profit to themſelves by altering them. This proviſo was there inſerted, no one knows how! but there is not a lord who hears me, that does not ſuſpect that it was done by private application. It often happens that fraud defeats its own end. Thoſe perſons, whoever they were, that

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

that procured this proviſo to be added to the act, did not know that it would have no operation, at leaſt none that would anſwer the purpoſe it was intended. It cannot operate on any part of this act but ſuch as is introductory of a new law *(a)*. If it could have any other, and ſuch as is contended for, it would repeal the preſent equity for ſo much, and ſo the legiſlature, who meant to eſtabliſh the old equity of the land would in fact have deſtroyed it. It does provide that nothing therein contained, ſhall affect ſuits commenced before the 15th of *May* 1780, that is, ſuppoſing it to be a new law; for if it were in force before, ſuits commenced before that time muſt have been ſubject to its operation. It has been ſaid that Lord *Muſkerry* was in poſſeſſion on the 7th of *September*, at the time of the paſſing of the act, and therefore that it was concluſive againſt the appellant. But have I not ſhewn that the judgment was ſubject to the order of the Court of Chancery, and conſequently is now ſubject to the order of this houſe? It is ſaid that it was an ejectment on the title. True; for if it had been an ejectment for non-payment of rent, it would have ſet up the leaſe; but be that as it may, the judgment and execution were ſubject to the order of the Court of Chancery, and are now ſubject to the order of this houſe.

It is ſaid that it will be a great hardſhip on Lord *Muſkerry*, if he ſhould be obliged to account for the profits of the land for the time that he has been in poſſeſſion. Is not that the caſe of every landlord who recovers under an *Habere* for non-payment of rent?

(*a*) Alluding to ſect. 2 of the act.

1787. HOUSE of LORDS. Magrath *againſt* Lord Muſkerry.

Muſt they not always account for the profits, if the tenant chuſe to redeem? But if there be any hardſhip on Lord *Muſkerry*, he has brought it on himſelf, by going into poſſeſſion. This caſe is clearly within the meaning of the act, and the proviſo does not in any ſort prevent it, for it affects only that part which introduces a new law, otherwiſe it would be a repeal for ſo much.

Decree affirmed.

Petition for re-hearing by the Lords rejected.

On *Monday* the 21ſt of *May* 1787, was taken into conſideration a petition of the appellant, praying a re-hearing. It only ſuggeſted that the merits of petitioner's appeal had not been ſufficiently laid before the houſe. The Earl of *Carhampton* moved, that the prayer of the petition might be granted. In this he was ſupported by Lord Viſcount *Pery* ſingly, who in the courſe of the debate, in order to obviate the objections made upon the ground of the danger of admitting re-hearings, propoſed that the motion ſhould be, that the prayer of the petition ſhould be granted, for the purpoſe only of taking the opinion of the judges upon the tenantry act. This was oppoſed; and the queſtion being put ſeparately upon the amendment and upon the original motion was negatived without a diviſion. A motion was then carried without a diviſion, that the petition ſhould be rejected.

The Lords who ſpoke in this debate againſt the petition were, the Lord *Chancellor*, the Archbiſhop of *Caſhel*, the Earls of *Hillſborough*, *Bellamont*, and *Farnham*, Viſcounts *Mountgarret* and *Mountmorris*, and Lord *Earlsfort*.

Their lordſhips objections were grounded partly on the weakneſs of the ſuggeſtion of the petition,

petition, but principally upon the inexpediency in general, of admitting re-hearings of cauſes determined by the Houſe of Lords *(a)*.

1787.
HOUSE of LORDS.
Magrath *againſt* Lord Muſkerry.

(*a*) Mr. Juſtice *Blackſtone*, in the introduction to his Commentaries, on the ſtudy of the law, in ſpeaking of the judicial capacity of the *Peers* ſays, "Their ſentence is final deciſive, irrecoverable; no appeal, no correction, not *even a review can be had*: and to their determination whatever it be, the inferior Courts of Juſtice muſt conform, otherwiſe the rule of property would no longer be uniform and ſteady."

Eaſter

Eaſter Term 27 Geo. 3.

MEMORANDUM. In the month of *March* preceding this term, the Right Honourable *Marcus Paterſon*, Lord Chief Juſtice of the Common Pleas died. He was ſucceeded by *Hugh Carleton*, Eſquire, his Majeſty's Solicitor General, who took his Seat on the Bench the 10th of *May* 1787.

Arthur Wolfe, Eſq. was appointed Solicitor General in his room.

On the 11th of *May* 1787, *John Bennett*, Eſq. took his Seat in the Court of King's Bench in the room of the late Mr. Juſtice *Robinſon*.

Exchequer.

Leſſee of PURDON v. O'BRIEN.

Thurſday 26 April. 1787.

The court out of which the record iſſues will not take cogniſance of the ſheriffs neglect to return *Diſtringas* to the judge of *Niſi Prius*.

MOTION for an attachment againſt the Coroner of the county of *Clare* for not returning the *Diſtringas* in this cauſe, whereby a trial was loſt.

Power B. This motion is unprecedented. An application ought to have been made to the judge of aſſize, who is not only competent, but in my opinion, the only competent perſon to puniſh the ſheriff or coroner for this omiſſion.

omiſſion. This Court has no juriſdiction over a ſheriff for miſbehaviour at the aſſizes. If the juſtices had not come to the town before the return of the writ, the contempt would have been to this court, which then would have interfered. 1787.

Per Cur. Motion refuſed.

KEEFE v. MARY ARCHDEKEN.

ASSUMPSIT by the payee of a bill of exchange againſt the acceptor, upon the bill, with other common counts. The count upon the bill recited that "one *Peter Wall*, made his certain bill of exchange in writing, and directed ſaid bill of exchange to defendant, by which ſaid bill of exchange ſaid *Wall* requeſted defendant in ſix months after date, to pay plaintiff or his order 50*l.* value received." It then recited the acceptance by defendant of ſaid "bill of exchange" and that by reaſon of the premiſſes, and by force of the ſtatute in that caſe made and provided, the defendant became liable to pay the plaintiff ſaid ſum in ſaid bill of exchange contained according to the tenor and effect of ſaid bill of exchange, and of her ſaid acceptance thereof, and being ſo liable promiſed to pay ſaid ſum in ſaid bill of exchange contained, &c.

Upon

Monday April 30. Keefe *againſt* Archdeken.

Declaration, ſetting out a good bill of exchange within the cuſtom of merchants, and not otherwiſe alluding to the cuſtom, is good after verdict.

1787.
Keefe
againſt
Archdeken.

Upon *non aſſumpſit* pleaded, the plaintiff obtained a general verdict †. In arreſt of judgment objection was taken, that the count on the bill of exchange was defective, as it contained no ſuggeſtion or averment that the bill was drawn or accepted, or that the defendant became liable *by the cuſtom of merchants*.

The Attorney General, the Recorder, and Mr. *Downes* argued in ſupport of the motion in arreſt of judgment; Serjeant *Fitzgerald*, Sir *F. Flood* and Mr. *Flood contra*.

For the defendant. This declaration does not any where alledge that this action was brought on the cuſtom of merchants, or contain any alluſion to it to ſhew that plaintiff relies on it, tho' the acceptor is only liable by that cuſtom. The acceptance in its ſelf is but a *nudum pactum*, and there is no privity between the payee and the acceptor, 1 *Vent.* 152. 1 *Lev.* 298. S. C. 1 *Mod.* 285. S. C. 11 *Mod.* 22. In Lord *Ray*, 281. *Powel* J. ſaid that an action on a bill of exchange, unleſs plaintiff declare upon a cuſtom to ſupport the *aſſumpſit* according to the common form, will not be maintainable. All the caſes above cited ſhew that an *indebitatus aſſumpſit* will not lie upon a bill of exchange. The action upon

† This cauſe was tried before the Lord Chief Baron the 1ſt of *December* 1786. *Wall*, the drawer of the bill, was offered as a witneſs on behalf of defendant to ſhew that the conſideration for which the bill was paſſed to the plaintiff was illegal, *viz.* his ſtifling a proſecution for felony againſt two other perſons; but the Chief Baron rejected him as incompetent. After the Chief Baron had ſo ruled, the caſe of *Walton* and al.' aſſignees of *Sutton* v. *Shelly*, 1 *Term. Rep.* 296, (juſt then publiſhed) was referred to, as correſponding with his opinion, and the Chief Baron having peruſed the caſe, ſaid it was in point. The principle there is, that a perſon is not competent to impeach a ſecurity which he has given, tho' he is not intereſted in the event of the ſuit.

1787.

Keefe *againſt* Archdeken.

on a bill is founded ſolely on the cuſtom, ſo there is no occaſion to lay a ſpecial promiſe, 1 *Salk* 128. The cuſtom being the only ground, the omiſſion of it in the declaration would be fatal on a general demurrer, for by the ſtatute for the amendment of the law, on a general demurrer the plaintiff cannot have judgment unleſs a ſufficient ground appear. It is true, it is here called a bill of exchange; but that is not enough. It was called ſo in thoſe caſes which ſhew that *indebitatus aſſumpſit* will not lie on a bill of exchange: nor will the concluſion, "by virtue whereof, &c. the defendant became liable" ſupply the defect, where in truth the defendant does not appear from the premiſſes to be liable. There is no caſe where a declaration upon a bill of exchange has been held good, without alluding to the cuſtom. Formerly it was neceſſary to ſet out the cuſtom at large, and to ſhape it to the caſe. Afterwards it was held ſufficient to ſay that the bill was drawn according to the cuſtom of merchants. It will, perhaps, be ſaid that the court will take judicial cogniſance of the cuſtom. This muſt be admitted. But it ought to appear that the party grounds himſelf upon the cuſtom. If debt be brought on a penal ſtatute, the plaintiff muſt ſhew that he relies thereon; otherwiſe the declaration would be bad, tho' the court is bound to take notice of the ſtatute as much as of the cuſtom. Perhaps it will be ſaid that in *Ereſkine* v. *Murray*, 2 Lord *Ray.* 1542, the declaration was held good, tho' it did not alledge that the bill was drawn according to the cuſtom of merchants, and that it is there ſaid the court would take notice of the cuſtom without

1787.

Keefe *againſt* Archdeken.

out its being ſet out, and if the bill as ſet out in the declaration appear a good bill, it was ſufficient. But there the court did not ſay that the declaration would be good without any alluſion to the cuſtom, and in that caſe the plaintiff concluded his declaration with averring that by force of the premiſſes and the cuſtom the defendant became liable, ſo that there was an alluſion to the cuſtom, and the ſmalleſt alluſion thereto, we admit would be ſufficient. Without the cuſtom there is no conſideration for the promiſe, and the court will not preſume a conſideration even after verdict. 1 *Salk.* 364. Where the giſt of the action is omitted, verdict does not cure, *Cowp.* 826. To have a matter preſumed after verdict, it muſt be in ſome degree put in iſſue. *Crowther* v. *Oldfield*, 1 *Salk.* 364. Thus in an action againſt a drawer of a bill of exchange, the omiſſion of ſtating a demand on the acceptor and notice, of non-payment, to the defendant, is not cured by verdict. *Doug.* 654.

For the plaintiff. Judgment ſhall never be arreſted for an omiſſion in the declaration, of what muſt have been proved at the trial. 2 *Show.* 233. In this caſe, if the plaintiff had not proved at the trial a good bill of exchange according to the cuſtom, he could not have obtained a verdict. The words "bill of exchange," *ex vi termini* import it to be according to the cuſtom of merchants, and the bill ſtated in the declaration appears to be ſo, and the cuſtom being a general one, the court is bound to take notice of it. That, if the bill ſet out be within the cuſtom, it is ſufficient, is expreſsly laid down in 2 Lord *Ray.* 1542. If it

1787.
Keefe *againſt* Archdeken.

it be not within the cuſtom, calling it a bill within the cuſtom, will not make it good, 3 *Wils.* 207. In *Hardres* 485, it was held that inſerting the cuſtom of the realm in the declaration was mere ſuperfluity and redundancy. The cuſtom of merchants relating to bills of exchange is the cuſtom of the realm, and therefore inſerting it would be mere redundancy. In the caſe in 1 *Lev.* 298, which has been ſo much relied on, the ſecond count was a general *indebitatus* for an accepted bill of exchange, and the damages were entire, and therefore judgment was arreſted, as a general *indebitatus* will not lie on an accepted bill of exchange, *Hard.* 485. 1 *Vent.* 152.

On this day the Barons delivered their opinions againſt the motion.

Yelverton Lord Chief Baron. I have conferred with my brethren on this caſe, and we are all clearly of opinion that the judgment ought not to be arreſted. I have looked into all the caſes that have been cited. Two of them are exactly in point. The firſt is in *Hardres*, 487. The words of the court are "This courſe of accepting bills being a general cuſtom amongſt all traders both within and without the realm, and having every where that effect as to make the acceptor ſubject to pay the contents, the court muſt take notice of that cuſtom, but the cuſtom does not extend ſo far as to create a duty or debt." And therefore wherever debt or *indebitatus aſſumpſit* has been brought upon an accepted bill of exchange, it has univerſally been overruled, becauſe the acceptance is but a collateral obligation. Here the queſtion is only whether the cuſtom is ſufficiently alluded to.

In

1787.

Keese *against* Archdeken.

In my opinion it is; for the bill as it appears on the face of the declaration, has all the qualities of a bill of exchange within the cuſtom of merchants. The other caſe is that of *Erſkine* and *Murray*, 2 Lord *Ray.* 1542, where the reſolution of the court was, that the law took notice of the cuſtom of merchants without ſetting it out ſpecially, and if the bill as ſet out in the declaration appear to be within the cuſtom of merchants it is ſufficient. It is true, the caſe proceeds "Beſides after ſetting out the bill and acceptance, it is ſaid, *inde ſecundum conſuetudinem mercatorum*, the defendant became liable" which the court held ſufficient. But that means no more than this, that if it were neceſſary expreſsly to refer to the cuſtom, that was ſufficient; and it is thrown in as a ſecondary reaſon auxiliary to the general one. But if the bill as ſet out in the declaration appear to be a good bill of exchange within the cuſtom of merchants, I think the court are bound to take notice of the cuſtom without any expreſs reference thereto. In the ſame book page 281, there is a ſaying of *Powel* Juſtice, that the court would take notice of the *Lex Mercatoria*, as that there is no ſurvivorſhip amongſt merchants, or of a general cuſtom; but that a ſpecial cuſtom ought to be pleaded; as in an action upon a bill of exchange, unleſs the plaintiff declare upon a cuſtom to ſupport the *aſſumpſit*, the action will not be maintainable. Now is the law of bills of exchange leſs known than that of there being no ſurvivorſhip amongſt merchants? He takes that to be a ſpecial cuſtom which I think a general one. But even that aſſertion may be ſupported in one

1787.

Keefe *againſt* Archdeken.

one ſenſe; that is, that it is neceſſary to ſet out the bill of exchange, ſo that it ſhould appear to be a good bill of exchange, within the cuſtom of merchants, for if the plaintiff declare that the defendant being indebted to him in a certain ſum of money for a certain accepted bill of exchange, aſſumed upon him to pay it; this certainly would be bad, and the caſe cited from *Levinz* goes no further.

Power, Baron. This is the firſt declaration upon a bill of exchange, that I have ever met with, in which there was no reference or alluſion to the cuſtom of merchants, and therefore I give no opinion whether this declaration would be a good one upon a ſpecial demurrer. But now it comes before the Court after verdict for the plaintiff. This caſe was very ably argued by Mr. *Downes*, laſt term, in ſupport of the motion. But being after verdict, which plaintiff could not have obtained without producing at the trial a good bill of exchange within the cuſtom of merchants; and it being admitted in the argument, that this bill as ſet out upon the declaration is good within the cuſtom, I thought it clear upon the firſt argument, that the judgment could not be arreſted. It has now been argued again, and I continue of the ſame opinion, and for theſe reaſons. The courſe of declaring on bills of exchange, has varied exceedingly from time to time. Formerly the cuſtom was ſpecially ſet out, as if it were not a part of the law of the land, but merely a local cuſtom. Many inconveniencies aroſe from that mode of declaring. Afterwards it was held ſufficient by ſpecial pleaders to alledge that the "Drawer "according to the cuſtom of merchants, made

1787.

Keefe *againſt* Archdeken.

" made his bill of exchange, &c." and ſo it continued down to the caſe of *Ereſkine* and *Murray*. There this very objection was made, *viz.* that the declaration did not ſtate, that the bill was drawn according to the cuſtom of merchants. But the Court held, that if it appeared to be a good bill of exchange, as ſet out in the declaration, it was ſufficient. However, they took hold of the allegation there that, " by reaſon of the premiſes, according to the cuſtom of merchants, the defendant became liable." This they held to be a ſufficient alluſion to the cuſtom. So that I may ſay I have not been able to find any one caſe in print, where a declaration upon an accepted bill of exchange, without reference or alluſion to the cuſtom has been held good. Therefore, I deſire to be underſtood to give no opinion upon it, had this objection come before the court upon a ſpecial demurrer, but it being after verdict, to obtain which the plaintiff muſt have produced at the trial a good bill of exchange, as it appears to be upon the face of the declaration, I think the judgment ought not to be arreſted.

Hamilton, Baron. I am of opinion with my brethren; I think the declaration ſets the bill forth with all the eſſentials to make a good bill of exchange within the cuſtom. It would have been almoſt tautology to have ſaid that it was drawn according to the cuſtom. If the plaintiff had not proved the bill to be within the cuſtom of merchants, he could not have had a verdict.

Motion refuſed.

CRAWLEY

1787.

CRAWLEY against ARCHDALL and others.

Crawley *against* Archdall and others.

In the title of a declaration in treſpaſs *vi et armis*, it is alledged that plaintiff complains in treſpaſs *on the caſe*; after verdict amendment is made by ſtriking out the words "*on the caſe.*"

THE declaration was for an aſſault and battery, in the uſual form; but in the title of it, it was ſtated, that the plaintiff complained againſt the defendants, in a plea of treſpaſs *on the caſe*. The defendant *Archdall* pleaded, Firſt, the general iſſue, and ſecondly, *ſon aſſault demeſne*. Upon the trial, a verdict was found againſt him, with 500 l. damages. A motion was made in arreſt of judgment, grounded upon the variance between the title and the declaration; and on behalf of the plaintiff a croſs motion was made, to amend by ſtriking out the words, "*on the caſe.*

Mr. *Caldbeck*, the Recorder, and Mr. *Browne* for the amendment.

The charge againſt the defendant, and the nature of the action are fully ſet out in the declaration; the words "on the caſe" make no part of the charge. They do not miſlead the defendant. They are merely the entry of the officer intitling the declaration; and having been erroneouſly introduced, the Court will correct the miſtake, and order them to be ſtruck out. Here there is manifeſtly ſomething to amend by; for immediately after thoſe words follow theſe: "For that with force and arms, &c. &c." And the whole declaration imports the action to be treſpaſs *vi et armis*, excepting thoſe words by which it is wrongly entitled. The grand diſtinction between treſpaſs *vi et armis* and treſpaſs on the caſe, in this ſtage of the cauſe is, that in the former,

1787.

Crawley *againſt* Archdall and others.

former, a *capiatur* is awarded, and in the latter a *miſericordia*; but the ſtat. 17 and 18 Car. 2. c. 12. has made that immaterial. By that ſtatute it is enacted, "that after verdict, judgment ſhall not be ſtaid or reverſed for default in form, or lack of form, or for want of pledges, &c. for omiſſion of *vi & armis*, or *contra pacem*; or for omitting *miſericordia* or *capiatur*; or for inſerting the one for the other, &c. but that all ſuch omiſſions, variances, defects *and all other matters of like nature*, not being againſt the right of the matter of the ſuit, nor whereby the iſſue or trial are altered, ſhall be amended." The amendment we ſeek, though not in a matter expreſsly ſpecified by the act, is certainly in a matter of like nature. It is not againſt the right of the matter of the ſuit; nor would the iſſue or trial be altered by it. On the contrary, it goes in affirmance of the right, which has been found by the verdict, and it affirms the defendant's own plea and the iſſue he has ſupported. For in order to ſee what the nature of the action is, the Court is not confined to the charge in the declaration, but may ſee what meaning the defendant himſelf has put upon it. He has here pleaded in a manner applicable only to treſpaſs *vi & armis*. He has pleaded *ſon aſſault demeſne*, which he could not have pleaded to treſpaſs on the caſe, ſo that he is now eſtopped from ſaying that the action is not treſpaſs *vi & armis*. And in *Co. Lit.* 303. it is laid down, that where the count, bar, replication, &c. are defective in point of form, they may be made good by the plea of the adverſe party. The defendant cannot now queſtion the judgment which is to follow

1787.
Crawley *againſt* Archdall and others.

follow the nature of his own plea. The criterion of the amendment ſought, is—Does it alter the plea, or the nature of the iſſue? In the *King* v. *Ellames*, *Cas. temp. Hardw.* 44. the doctrine of amendment is fully gone into, and it is there ſaid, that in furtherance of juſtice, and in order to obtain the right between the parties, amendments have been much extended. There are ſeveral authorities in the books to warrant this amendment. In *treſpaſs* if the *venire* or *habeas corpora juratorum* be *in placito debiti*, it is amendable after verdict. 1 *Roll. ab.* 204. *l.* 33. The iſſue was *in placito tranſgreſſionis*, but the venire was *in placito tranſgreſſionis ſuper caſum* this held amendable. *Lit.* 54. A miſpriſion of the clerk conſiſts either in omitting or adding a thing which it appears he ought to have added or omitted of courſe; and that is amendable, 8 *Co.* 160. In 8 *Co.* 159, other inſtances of amendment are given. After error brought, an amendment may be made in a matter not tending to deceive. Judgment againſt an executor *de bonis propriis* was amended to *de bonis teſtatoris*, *Doug.* 110. *n.* Lord *Mansfield's* words in *Sayer.* v. *Pocock*, *Cowp.* 408. apply ſtrongly to this caſe. "One is aſhamed and grieved that ſuch objections remain; they have nothing to do with the juſtice of the caſe, but only ſerve to entangle, without being of the leaſt aid in preventing irregularity. Without conſidering whether it be within the ſtatute of jeofails or not, it is beſt to amend, to avoid a writ of error. By amending in the preſent caſe, the court will only make that right, which the defendant himſelf

1787.

Crawley *againſt* Archdall and others.

himſelf underſtood to be ſo, by his going down to trial."

Mr. Attorney General, Serjeant *Toler*, Mr. *Boyd*, and Mr. *Burſton* againſt the amendment. The law of amendments in the plea ſide of the Court of Exchequer, is the ſame as in other courts of law, which derive their juriſdiction from the original; for though it is not now the courſe of this court to file any bill, it was formerly the mode when this court and the King's Bench firſt took upon them juriſdiction of matters of this nature after the diſſolution of the *Aula Regis*, and the practice is now to proceed as if an original had been ſued out, and to recite it in the title of the declaration; the title therefore may be conſidered as the original, and when the title is of one ſort of action, the declaration can never change it to another, but if there be a variance between them, it will be fatal. The only queſtion then is, can the original be altered by the ſubſequent declaration, which is founded upon it, and ought to follow it? *Co. Lit.* 303, *a*. The declaration is but the expoſition of the writ and muſt be agreeable and conformable to it. In 3 *Buls.* 224, the original writ varied from the count, it was held bad and not amendable, and judgment arreſted, ſo in 1 *Bulſt.* 151, and *Cro Eliz.* 185. and 829. 2 *Salk.* 701. But the declaration is to be amended by the writ. 2 *Lutw.* 1509. 2 *Str.* 1151. and 1162. Then if the declaration is to be amended by the writ this will be a declaration in treſpaſs on the caſe, and if it be ſaid that there is no writ, then there will be nothing to amend by, and they cannot amend at all, Lord *Ray* 771: in either of which caſes judgment muſt be arreſted.

1787.

Crawley *againſt* Archdall and others.

ed. The ſtatutes of jeofails only meant, to help caſes of mere form, and not to extend to matters of ſubſtance, which the amendment here ſought would effect, for it would alter the judgment and coſts, and by making the action treſpaſs *vi et armis* inſtead of caſe, impoſe a fine to the King on the defendant, which he is not at preſent ſubject to. It would ſubſtitute a new form of action in the place of that which was firſt filed, whereas the ſtatutes only give a power to amend a variance in that already brought.

Great miſchiefs would ariſe if theſe two actions of treſpaſs *vi et armis*, and *on the caſe* ſhould be ſuffered to be blended or confounded together; in all the caſes in the books where that queſtion was before the court, it was uniformly decided againſt ſuch an attempt. *Hard.* 60. 1 Lord *Ray*, 272. 2 Lord *Ray* 1399. 2 *Wils.* 313. 2 *Bur.* 1114. 3 *Bur.* 1556.

Yelverton, Chief Baron. This comes before the court on a motion in arreſt of judgment, and on a motion to amend the declaration by ſtriking out the words *on the caſe*. If it were ſimply a motion in arreſt of judgment, I ſhould think the inſertion of the words *on the caſe* a fatal objection; but on the motion to amend, a different conſideration is involved. In arguing againſt the amendment, the defendant's counſel have confounded a juriſdiction by original with an original juriſdiction; than which nothing can be more different. Where the court proceeds by an original, which gives it juriſdiction, a variance between the count and the writ is fatal, for as the court cannot proceed or entertain the matter without the original, it is incumbent on the plaintaiff to bring

1787.

Crawley *againſt* Archdall and others.

himſelf within the writ; but where there is an inherent original juriſdiction in the court, it is very different; and that I take it every court has, that ſprang out of the *Aula Regis*, between its own officers and ſervants. It is on that ground we proceed here where the party is a debtor to the King, between the King's debtors and the defendant. It is on the ſame ground of juriſdiction that the Court of King's Bench proceeds in matters of a civil nature, when the party is brought in for a breach of the peace. The ground of the judgment is a fine to the King, but to enlarge the juriſdiction they give the plaintiff leave to declare in any action, when once the defendant has been brought into their court. My brother *Hamilton* mentions to me a caſe in 1 *Black.* 462. that was much ſtronger than the preſent. There the bill of *Middleſex* was in debt for a penalty. The court there had no original juriſdiction. The bill ought to have been in treſpaſs with an *ac etiam* in debt. Lord *Mansfield* with the concurrence of the reſt of the court, gave leave to amend the bill on the file by inſerting the words, "treſpaſs *ac etiam*," in debt, though treſpaſs was neceſſary to give the court juriſdiction; ſo here if there had been abſolutely a bill on the file, we might give the plaintiff leave to ſtrike out the words *on the caſe*. But I do not know any diſtinction in this court between the bill and the declaration; they ſeem to me to be the ſame. I do not believe that any bill ever was filed in this court diſtinct from the declaration, *(a)* and for this I appeal to

(*a*) Vide Cro. Jac. 108, 109, where the court ſay that the want of an original writ out of Chancery is aided by 18 *Eliz.* but it extends not to proceſs, which is in nature of an original writ, and therefore it

1787.

Crawley *againſt* Archdall and others.

to the practice of the court. The declaration is introduced in this manner:—A. B. complains by his bill, the tenor of which follows in theſe words,—and then goes on with the declaration; ſo that the declaration is the bill, and the title is nothing more than the entry of the officer. The queſtion then is, can we amend the title by ſtriking out theſe words. Suppoſe we ſtrike out all the words of the title, *treſpaſs on the caſe*, it will then run: *John Crawley* againſt *Mervyn Archdall*, &c. complains. It would then be the duty of the officer to give the action a proper name. This he has failed to do; then ſhould not we ſet it right? If the word *treſpaſs* only had been made uſe of, it would have been good; then the words *on the caſe* are mere ſurpluſage. The declaration itſelf is in treſpaſs *vi et armis*, and the defendant himſelf has conſidered it as ſuch, for he has pleaded *ſon aſſault demeſne*, which is only applicable to that action, and all the proceedings have gone on as in an action of treſpaſs *vi et armis*. I therefore think we may amend by ſtriking out the words *on the caſe*. The doctrine of amendments is well diſcuſſed in *Hardwicke*'s caſes 44. King againſt *Ellames*. It is ſaid, that if there be nothing to amend by, you cannot amend; but I think there is ſufficient here to amend by, and that we may give the action that name, which by its nature it arrogates to itſelf.

Power, B.—If this motion to amend had been made in former times, even before the ſtatute 8 *H.* 6. *c.* 12. ſuppoſing ſuch a declaration

it hath been ruled that the want of bills upon the file in the King's Bench, (which are in nature of an original writ) is not aided; *ſo the want of a bill in the Exchequer* which is there in nature of an original writ.

1787.

Crawley *againſt* Archdall and others.

tion to have been filed, it would in my opinion have been next to a motion of courſe; and if there had been no motion in this court, and error had been brought upon this objection, the record would have been ſent back to be amended. The plaintiff by his declaration has ſet forth his cauſe of action, (for the bill and the declaration in this court are ſynonimous terms) by this it appears to be an action of aſſault and battery. All the caſes that have been cited apply only to the court of Common Pleas. Suppoſe the action had been brought there, and the *præcipe* for the writ given to the officer; unleſs you ſuppoſe him to be totally ignorant, the original muſt have been made out in treſpaſs *vi et armis*. But here all that is to be laid out of the caſe. We muſt take it on the face of the declaration, and by that it muſt ſtand or fall. The matter of the action is clearly there expreſſed to be in treſpaſs for an aſſault. By this motion to amend no alteration is deſired in the nature of the action or of the iſſue. Both were on the aſſault, and on that the parties went to trial. What is it that the plaintiff ſeeks to alter? It is the blunder of the clerk or the overſight of counſel, and one could ſcarcely ſuppoſe it to be the latter; but which ever it was, it could have been amended before any of the ſtatutes of amendment. If it were to alter the nature of the action, or any how vary the record, ſo as there ſhould be a different iſſue, no court would alter it; but all that is deſired is to ſtrike out the words *on the caſe*, and then the declaration will be in ſtrict form. But though this were not amendable at common law, it falls directly within the ſtatute

1787.
Crawley *againſt* Archdall and others.

tute 32 *H.* 8. *(a)*. The amendment ſought is not againſt the right of the ſuit, neither does it alter the iſſue, (the defendant has pleaded *ſon aſſault demeſne*) and if it do not, the miſtake is clearly amendable under the ſtatute as well as by common law.

Hamilton, B.—The plaintiff muſt in every caſe, if he recover at all, recover *ſecundum allegata et probata*. The *allegata* diſcloſe the nature of the action, and the law gives it a name. Here it is clearly an action *vi et armis*, but then there are words thrown in which are contradictory; ſhall we overſet it for this miſ-nomer. The caſe in *Blackſtone* is much ſtronger; there the court allowed the word *treſpaſs* with an *ac etiam* in debt to be inſerted in order to give the court juriſdiction.

Metge, B.—The counſel, who have argued againſt the amendment, have failed in the principles from which they have drawn their concluſions. They have argued as if this court had no original juriſdiction. Nothing is more clear than the contrary. They ſay the bill is the original, but in that they have failed alſo. Where there is an original, the ſubſequent part of the record can not vary from it; but that is becauſe the original gives the juriſdiction, but here we have juriſdiction without an original.

Per Curiam. Amend the declaration by ſtriking out the words "*on the caſe.*"

CASTLES

Ch. 30. *Eng.* 33 *H.* 8. *Seſſ.* 2. *ch.* 3 *Iriſh.*

1787.

Caſtles *againſt* Merchant.

CASTLES *v.* MERCHANT, Executor of WILLIAM MERCHANT.

Monday 7th May.

To a declaration on a promiſary note payable after date. *Actio non accrevit*, &c. is the proper way of pleading the ſtatute of limitations.

THE plaintiff declared on a promiſory note made by the teſtator, dated 2d of *November* 1778, for 56l. 9s. payable three months after date, with intereſt from the date. Pleas *non aſſumpſit*; and 2dly. That the cauſe of action in the declaration mentioned, did not accrue within 6 years next before exhibiting the bill.

To this ſecond plea the plaintiff demurred generally.

The Recorder for the plaintiff. The plea in this cauſe ought to have been *non aſſumpſit infra ſex annos*; for where the action ariſes out of the *aſſumpſit* itſelf, *non aſſumpſit infra ſex annos* is the proper plea, but where it ariſes out of ſomething collateral to the promiſe, it ſhould be *actio non accrevit* &c. as a promiſe to pay for what ſhall be provided for a third perſon. Here the making of the note is the cauſe of action, and by the ſtatute it creates a preſent debt, *Debitum in præſenti ſolvendum in futuro*; and the rather in this caſe, becauſe the note is payable with intereſt from the date. The plaintiff could not have replied that the action did accrue within ſix years, for that would have been a departure from the declaration, in which he alledges it to have accrued in the year 1778. *Bull. N. P.* 160. (Dub. Ed. 1773). to *indebitatus aſſumpſit* to pay on demand, the defendant pleaded *non aſſumpſit infra ſex annos*, and

1787.

Caſtles *againſt* Merchant.

and on demurrer it was held good, for an *indebitatus aſſumpſit* ſhews there was a debt due at the time of the promiſe, but if the promiſe had been of a collateral thing, it would be otherwiſe; in ſuch caſes *non accrevit* would be the proper plea. 2 *Salk.* 422. 1 *Mod.* 70. *Cro. Car.* 139.

Mr. *Paul* and Mr. *Dickſon contra.* This plea is not only proper, but the ſtatute could not in this caſe have been properly pleaded in any other way; *actio non accrevit* is a good plea of the ſtatute in all caſes; but there are ſome in which *non aſſumpſit infra ſex annos* is bad, as when the promiſe is executory; to be done on a future day. The words of the ſtatute are—that the action ſhall be brought within ſix years next after the cauſe of ſuch action or ſuit but not after. Immediately after the paſſing of the act, it was uſual to plead the ſtatute at length in the words of it; and there is no one caſe in which it was decided, that *actio non accrevit* is bad in any caſe; the reply to it is as ſimple as poſſible; namely that the cauſe of action did accrue within ſix years. 1 *Vent.* 191. 2 *Salk.* 422. 10 *Mod.* 311. ſhew this plea to be proper, and *Lut.* 1607. 2 *Keb.* 874. 1 *Mallory* 330, ſhew that *non aſſumpſit infra ſex annos* would in this caſe be a bad plea. As to the note being payable with intereſt; neither the principal nor the intereſt could be demanded till the three months had expired; then and not till then the right of action accrued.

Power, Baron.—There is no doubt *non aſſumpſit infra ſex annos* would have been a bad plea in this caſe, for the promiſe was made long before the right of action accrued.

The

1787.
Caſtles *againſt* Merchant.

The right of action did not accrue till three months after the date of the note, and continued till *February* 1785. In all caſes where the right of action does not accrue at the time of the promiſe, in order to take advantage of the ſtatute of limitations, the plea muſt be *actio non accrevit*.

Per. Cur. Demurrer over ruled.

Burroughs *againſt* Tape. Tueſday, 8th May.

BURROUGHS *v.* TAPE.

Caſe for a malicious proſecution. The record produced at the trial is of an acquittal before two judges different from thoſe before whom it was ſtated to be in the declaration. It is a fatal variance.

CASE for a malicious proſecution. The declaration ſtated an indictment for felony, and an acquittal at the ſeſſions of Oyer and Terminer for the county of *Waterford*, before *Kelly* and Sir *Samuel Bradſtreet*, Juſtices.—At the trial the record produced was of an acquittal before Lord *Earlsfort*, and the Lord Chief Baron. Verdict for the plaintiff, ſubject to the opinion of the court, whether the variance between the declaration and evidence was material. The court held that it was fatal, without argument, and a nonſuit was entered.

LONG

1787.

Same day. Long *againſt* Barnwell & al'.

LONG, Leſſee of Lord TRIMLESTON, againſt BARTHOLEMEW BARNEWELL, Executor of JOSEPH BARNEWELL, TYRREL O'REILLY and JOHN SUTTON.

A *ſcire facias* on a recogniſance on error by an executor, by which defendants acknowledge themſelves bound *according to the ſtatute in ſuch caſes*, &c. (whereas no ſtatute requires a recogniſance in ſuch caſe) and ſtating affirmance of the judgment, award of coſts and nonpayment thereof (the recogniſance being without a condition) held bad on general demurrer,

THIS was a demurrer to a *ſcire facias* upon a recogniſance entered into, upon bringing a writ of error on a judgment of the Court of Exchequer. The *ſcire facias* recited, that the plaintiff had recovered againſt the teſtator *Joſeph*, in a plea of treſpaſs and ejectment, his term, and alſo 232*l.* 10*s.* for his damages, *prout*, &c.; that the defendant *Bartholemew*, executor of the ſaid *Joſeph* (who ſoon after ſaid judgment died) ſued out a writ of error teſted the 30th of *May* 1782, &c.; that defendants on the 5th of *June* 1782 acknowledged themſelves jointly and ſeverally bound to the plaintiff in the ſum of 500*l.* for the ſaid *Bartholemew*, executor of, &c. in the ſaid plea of treſpaſs and ejectment of a farm, *according to the form of the ſtatute in ſuch caſe made and provided*, upon a writ of error returnable, &c. *prout*, &c.; that the judgment was affirmed, and that it was further conſidered, that the ſaid *Bartholemew*, executor of, &c. ſhould pay to the plaintiff the ſum of 276*l.* 11*s.* 2*d.* the double coſts of the ſaid plaintiff, aſſeſſed by the ſaid court, for delaying the execution, &c. *prout*, &c. and then concluded that nevertheleſs the ſaid *Bartholemew* hath not paid to the plaintiff the damages aforeſaid, amounting to 231*l.* 11*s.* as alſo the ſaid

276*l.*

1787. Long *againſt* Barnwell & al'.

276*l.* 11*s.* 2*d.* the double coſts, &c.——The defendant prayed, and had *oyer* of the recogniſance. They therein had acknowledged themſelves "jointly and ſeverally bound to the ſaid *John Long*, leſſee of the ſaid *Thomas Barnewell* (commonly called Lord *Trimleſtown*) in the ſum of 500*l.* ſterling, for the ſaid *Bartholemew*, executor of, &c. in a plea of treſpaſs and ejectment of a farm *according to the form of the ſtatute in ſuch caſe made and provided*, upon his Majeſty's writ for correcting errors returnable, &c." The defendants then demur to the *ſcire facias*.

The demurrer was argued by the Attorney General, Mr. *Wolfe*, and Dr. *Duigenan* for the defendants; and by Serjeant *Fitzgerald*, Mr. *Duquery*, Mr. *Butler* and the Recorder for the plaintiff.

For the defendants. The ground upon which this demurrer has been taken is, that the recogniſance is void, having been entered into under colour of a ſtatute, whereas there is no ſtatute requiring ſecurity on ſuing a writ of error, in a caſe ſimilar to the preſent. The Stat. 10 *Car.* 1. *Seſſ.* 3. ch. 8. is the firſt which requires ſecurity to be given on ſuing out writs of error. It extends only to perſonal actions; whereas this was an ejectment on the title. The next is 17 & 18 *Car.* 2. ch. 12. § 3, 5. which extends the proviſions of the former to writs of *Dower* and *Ejectione firmæ*. But neither of theſe ſtatutes inflicts double coſts, and in the latter it is particularly provided that it ſhall not extend to writs of error brought by executors or adminiſtrators, as this was. The next and laſt is 7 *W.* 3. ch. 25. which inflicts double coſts, and extends

to

1787.

Long *againſt* Barnwell & al'.

to Trover, Covenant, Detinue and *Treſpaſs*. So that this is the only ſtatute that can ſeem to warrant this recogniſance. But this very ſtatute perpetuates the 17 & 18th *Car.* 2. which contains the exception of writs of error brought by executors. Beſides, the word *Treſpaſs* there does not extend to ejectments on the title. Theſe acts were made only to accelerate the payment of money in perſonal actions; whereas an ejectment is a mixed action. It ſavours of the realty. The land itſelf is recovered by it, 5 *Co.* 105. *Aldens* caſe, 9 *Co.* 77. *b.* *Petoe*'s caſe. So that it muſt be admitted that there is no ſtatute requiring this recogniſance; and yet in the recogniſance it is expreſſed that the defendants are bound *according to the ſtatute.* This averment diſtinguiſhes the preſent caſe from that of *Johnſon* v. *Laſerre*, 2 Ld. *Ray.* 1459.—2 *Stra.* 745. where the recogniſance entered into by the executor (upon ſuing a writ of error) was conditioned to pay the ſum recovered with the damages and coſts, if the judgment ſhould be affirmed. There the obligation was not that they were bound *according to the ſtatute*, and the court held that tho' the executor was not obliged to give ſecurity; yet he having done ſo, the recogniſance was good at common law, and he was bound by it. But here the defendants are only bound *according to the ſtatute*, that is, not at all, for there is no ſtatute binding them. You cannot award execution according to a ſtatute which does not exiſt. It cannot be objected that we have not prayed *oyer* of the condition. To lay a ground for that objection, it muſt firſt be preſumed, that there is a ſtatute according to which the defendants

1787.

Long *againſt* Barnwell & al.

defendants are bound, and next, that a condition was annexed to the recognizance, purſuant to the ſtatute. Whereas there is no ſuch ſtatute, nor in fact was there any condition annexed *(a)*. So that the recognizance is an abſolute one, and imports that the defendants are bound to pay 500*l.* whether the judgment be affirmed or not. It is therefore the purchaſe of a writ of error, which, clearly, no ſtatute requires.

For the Plaintiff. The queſtion whether the executor was bound to enter into the recognizance may be laid out of this caſe. For though he were not obliged, yet having given it, he is bound by it, as is determined in *Johnſton* v. *Laſerre*. Nor can an objection be made here to the award of double coſts, if wrong it ought to be remedied elſewhere. It is not pleadable to the *ſcire facias*, 2 *Inſ.* 470. *Cowp.* 728. But it is ſaid that there is an exception in favour of Executors; then it ought to have been pleaded as was done in *Johnſton* v. *Laſerre*. Beſides the exception relates only to caſes where the judgment was againſt the executor himſelf, and with reaſon; for a judgment againſt teſtator affects the real as well as perſonal aſſets; and were not the executor to give ſecurity for coſts, upon ſuing error, the heir (in whoſe favour there is no exception) would procure the executor to conteſt the judgment upon cheaper terms than he himſelf could. In *Johnſton* v. *Laſerre* the court ſaid that though the executor was not obliged to enter into a recognizance conditioned in the manner preſcribed by the ſtatute, yet having ſo

(*a*) The record being ſent for, the re cognizance was found to be without a condition.

1787.
Long
againſt
Barnwell & al.

ſo done he was bound by it. What difference then is there in ſubſtance, whether the condition purſuant to the ſtatute be ſet out *verbatim*, or only alluded to, as it is here? ſhall it be ſaid in the firſt caſe, that becauſe you have not ſaid that the recognizance is according to the ſtatute, when in fact it is ſet out ſo, you ſhall be bound by it at common law; but in the latter, where you ſay it is according to the ſtatute, when in fact it is not ſet out ſo, that you ſhall not be bound by it.

This caſe ſtood over for judgment till to day.

Yelverton, Ch. Baron. I have looked into the caſe of *Johnſton* v. *Laſerre* reported by Lord *Raymond* and *Strange*, and I do not find the recognizance in that caſe was expreſſed to be *according to the ſtatute*; it was a recognizance entered into by an executor voluntarily, with ſuch a condition as the ſtatute directs, but no reference was made to the ſtatute, and the court held that though the executor was within the ſaving of the ſtatute, and need not have entered into the recognizance, yet having done ſo, it was good at common law; which of itſelf ſhews that there was no reference to the ſtatute, whereas here there is, and the ſtatute requires no recognizance. This is a recognizance for 500*l.* abſolute, and the *ſcire facias* ſtates a breach of condition, ſuppoſed to be annexed, according to the ſtatute; whereas it appears in the pleadings, and in fact, that there was no condition at all; which is very extraordinary, for all the recognizances in the ſame roll have conditions annexed to them. Suppoſe, without any reference to the ſtatute, a recognizance were entered into without any condition, and a

ſcire

1787. Long *againſt* Barnwell & al.

a *ſcire facias* thereon ſhould aſſign a breach of a condition which in fact did not exiſt, would not that of itſelf be ſufficient to damn the *ſcire facias*.

Per. Cur. Demurrer allowed.

Same day Caſſon v. Sankey and Trevor.

Casson v. Sankey and Trevor, Sheriffs.

In an action againſt a Sheriff for a falſe return to a *fi. fa.* the declaration did not aver that the debt was unſatisfied at the time of ſuing execution, good on ſpecial demurrer.

ACTION on the caſe for a falſe return of a writ of *fieri facias*. The declaration ſtated, that the plaintiff had obtained judgment as of *Trinity* Term laſt, againſt one *Doyle* for 96*l.* and 2*l.* 4*s.* 1*d.* coſts; that on 15th *June* following, he ſued out a *fi. fa.* in order to have that judgment executed, and that by virtue of that writ the preſent defendants ſeized goods of *Doyle* to the amount of 51*l.* 3*s.* 5*d.* *duly marked at the foot of the writ*, and then to defraud the plaintiff returned *nulla bona*. To this declaration a ſpecial demurrer was put in, and the cauſe aſſigned was, That it did not alledge that the ſum recovered remained unpaid on the ſaid 15th day of *June*, the day of ſuing out the execution. Other objections were taken at the bar, but not being of ſubſtance, the Court took no notice of them.

For the demurrer, Mr. *Duquery* and Mr. *Preſton* cited *Plowd.* 122. where in an action againſt a goaler for an eſcape, it was held that where the plaintiff did not expreſsly alledge that the debt was due, it was bad. They alſo cited

1787.
Caſſon *againſt* Sankey and Trevor, Sheriffs.

cited two precedents from the *Pleader's Aſſiſtant*, 207. & 209. where ſuch an averment is introduced; and argued, that varying from the uſual form of pleading is bad on a ſpecial demurrer.

The Recorder *contra*. The objection is, that the plaintiff does not alledge that the debt was unſatisfied at the time of ſuing out execution. Such an allegation is not neceſſary. If the judgment were ſatisfied, no officer would have iſſued execution. If it were alledged, the defendant could not have traverſed it. Until the act 6 *An. c.* 10. impowered the defendant in the action, he could not have pleaded payment either to a *ſcire facias* or to debt upon the judgment, and he is the only perſon in whoſe mouth it lies to ſay the debt was paid: he only could have had an *audita querela*. The caſe in *Plowden*, was debt againſt a goaler for an eſcape, there it muſt be averred that the debt was due, that being the giſt of the action. But this action is founded on the mis-feaſance or non-feaſance of the officer, and therefore it is not neceſſary to aver that the plaintiff had ſuſtained any injury, 1 *Rol. Rep.* 47. In an action for an eſcape againſt a ſheriff, exception was taken that it was not alledged that the debt was unſatisfied. But *per Curiam* it ſhall be intended.—2 *Cro.* 255. if a declaration ſhew a misfeaſance it is ſufficient, though it ſhould not ſhew any injury ſuſtained thereby. But ſecondly, if it were neceſſary that it ſhould appear in the declaration that the debt was unſatisfied; it does, in fact, ſo appear; by neceſſary implication and direct inference; and a direct averment is not neceſſary unleſs the action ariſe on a condition prece-

1787.

Caſſon *againſt* Sankey and Trevor, Sheriffs.

dent. It is here averred that the ſheriff ſeized to the amount of 51*l.* 3*s.* 3*d.* which was then *duly marked* on the foot of the execution, and by 6 *An.* c. 7. ſ. 1. it is provided, that on ſuing execution a certificate ſhall be lodged of the ſum demanded as due in good conſcience after all equitable deductions made, and that ſum ſhall be marked on the foot of the writ of execution, and that the ſheriff ſhall not levy a greater ſum than that marked. The declaration ſtates that 51*l.* 3*s.* 3*d.* was *duly* marked, and that by neceſſary inference implies that the ſum was then unpaid. The ſum marked is all that the ſheriff has to look to, and therefore ſince the ſtatute, it is better, as between the ſheriff and the party, to ſtate that the ſum was duly marked on the foot of the writ, than that it was due.

Mr. *Preſton* in reply. The declaration can only be ſupported by intendment, which on ſpecial demurrer cannot be made. *Polyblank* v. *Hawkins*. *Doug.* 314. The ſtatute of *Anne* was only made to confine the execution to the ſum really due, in order to prevent the party from going into equity, and does not at all alter the form of pleading. This caſe ſtood over that the Court might look into the precedents, till this day.

Yelverton, Chief Baron. I have examined the precedents, and find they warrant the diſtinction I took yeſterday upon the argument of this caſe, namely, that in actions for an eſcape, it is neceſſary to alledge that the debt was unpaid at the time of the eſcape, for that is the giſt of the action, the bare ſuffering of the eſcape will not make the ſheriff liable if the debt had previouſly been paid; it is the ſuffering

1787.
Caſſon *againſt* Sankey and Trevor, Sheriffs.

ſuffering him to eſcape while the debt remains unpaid, that makes the ſheriff liable. But in actions on the caſe for a falſe return it is otherwiſe; there there is no occaſion to aver that the debt was unpaid otherwiſe than by ſetting out the judgment. *Lilly's Ent.* 40—60. *Vidian* 6—1 *Mallory. Lord Raym. Ent.*

Power, Baron. The ſpecial cauſe of demurrer aſſigned is not to be ſupported by any authority, or upon any principles. The objection is, that it is not alledged that on the 15th day of *June*, the day of ſuing out the execution, the debt was unſatisfied. That cauſe cannot be ſupported as a defect of ſubſtance or a defect of form. If the debt had been ſatisfied, the certificate of the ſum due could not have been made, and without it the officer could not iſſue execution. The *fieri facias* therefore of itſelf is evidence that it was due. If the precedents had uniformly ſtated that the debt was due, we ſhould certainly have purſued the eſtabliſhed mode, but there is not a ſingle inſtance, (for I do not pay any regard to the book that has been cited,) where it is alledged that at the time of ſuing execution the debt was unpaid.

Hamilton and *Metge*, Barons, concurred.

Demurrer over ruled, and leave to plead refuſed.

1787.
Wednesday, 9th *May*.
Moore *againſt* Moore.

Action on a covenant in a leaſe for years, if certain lives laſt ſo long. Implication of their continuance good, on general demurrer.

SUSANNA MOORE and others, Executors of WM. MOORE, *v.* GEORGE MOORE.

THIS came before the Court upon a demurrer to a declaration in covenant for non-payment of rent. The declaration ſtated, that, Whereas *William Moore*, deceaſed, on the 6th *January* 1776, by a certain deed between him and the defendant, ſet and to farm let to the defendant, the premiſſes therein named for the term of ſeven years from 1ſt of November then laſt, *provided the perſons named as lives in the article under which the ſaid William Moore, deceaſed, held the premiſſes, ſhould ſo long live.* He the ſaid *George Moore* yielding and paying, &c. It then ſtated the covenant for the payment of the rent 147*l.* 17*s.* 6*d.* by half-yearly payments during the ſaid term; the entry of the leſſee, and general performance on the part of the leſſor and his executors and aſſigns, a breach in the non-payment of 561*l.* 3*s.* 9*d.* for ſix years and an half's rent ending the 1ſt of *May* 1782. To this declaration the defendant demurred generally.

Mr. *Burſton* and Mr. *Mayne* in ſupport of the demurrer. This action is brought upon the covenant for payment of the rent during the term, that is for ſeven years from the *November* then laſt paſt, provided the lives named in the article ſhould ſo long live; ſo that the defendant was not bound to pay longer than during the continuance of the lives; if the lives have fallen, the term and the obligation to pay have fallen alſo, and if the defendant had pleaded and gone to trial, the plaintiff to entitle

1787.

Moore *againſt* Moore.

entitle himſelf to a verdict muſt have proved the ſubſiſtence of the lives during the time for which the rent was ſought; and the rather that in this caſe the leſſor appears to have but a derivative intereſt himſelf depending on the ſame lives. It is a principle of pleading that every thing neceſſary to be proved at the trial muſt be averred in the declaration, in order to enable the court to give judgment. It may be ſaid that the plaintiff might have declared, according to the operation of the article, on a demiſe for ſeven years, without ſaying any thing of the lives; but having ſtated that it was determinable upon the fall of lives, he ought to aver their continuance, and it cannot be preſumed that they are in being, for on a declaration the court cannot preſume or intend, at leaſt in favour of the pleader. *Plow.* 202. Here it does not appear from the declaration that the lives exiſted an hour after the demiſe, and if they did not, the plaintiff is not entitled to recover. Their exiſtence is a material fact, and if averred might be traverſed. The continuance of particular eſtates, as of tenant in tail or for life, muſt be averred. *Co. Lit.* 303. *b.* and cannot be intended. *Plow.* 431. and in *Plow.* 31. it is ſaid, a plea of a leaſe *pur auter vie* is not a good bar without averring the life of *ceſtui qui vie*. *Plow.* 264 S. P.—1 *Mod.* 217. Avowry on a leaſe for 99 years if A. B. and C. ſo long lived, held bad for want of an averment that one of them was alive. 2 *Mod.* 93. S. C. Many caſes are cited in 5 *Com. Dig.* Tit. *Pleader* C. 66. where an averment of the continuance of the life was held not neceſſary; but in them it was apparent by neceſſary implication on the face of the declaration.

1787.

Moore against Moore.

Here it is not averred that the leſſee or any one under him held during the term. The 10 *Car.* 1. and 17 & 18 *Car.* 2. enact that after verdict, want of an averment of a life of *ceſtui qui vie* ſhall not be taken advantage of; that ſeems to imply that before verdict it would be fatal.

Mr. *Blackburne* and Mr. *R. Johnſon, contra.*

In this caſe no averment of the continuance of the lives was neceſſary; this caſe is different in its principle and conſequences from thoſe that have been cited; the eſtate conveyed is not a leaſe for thoſe lives, but for years defeaſible by the fall of them; an event which was a condition ſubſequent; and the principle is, that where the eſtate is to commence upon a condition precedent, the performance of it muſt be averred; otherwiſe, if the eſtate be to be defeated by a condition ſubſequent, for the party is not obliged to ſhew any thing againſt himſelf; that is to be ſhewn by the adverſe party, *Ughtred's Caſe.* 7. *Co.* 10. Here the eſtate paſſed by the demiſe. All the caſes cited are of real or mixed actions where the title to the lands was in queſtion, and there continuance of the eſtate was neceſſary to entitle the party to recover. But the preſent is a mere perſonal action for rent which by the demurrer is admitted to be due. The right to the arrear remains after the determination of the eſtate. The rule in *Co. Lit.* 303. *b.* relates only to caſes where the title to land is in queſtion. It is ſaid, the plaintiff's is a derivative intereſt; admitting it to be ſo, and even that the plaintiff had no title, yet the defendant is eſtopped by the indenture to conteſt it. The plaintiff, it is admitted, might have

1787.
Moore *againſt* Moore.

have declared on the demiſe for ſeven years abſolutely; if ſo, the mentioning of the lives is mere ſurpluſage, and averring their continuance is unneceſſary; nor would it be neceſſary for the plaintiff to prove it on the trial. But even if it were neceſſary that the continuance of the lives ſhould appear on the declaration, it does ſo here by neceſſary implication, which is ſufficient. This being a general demurrer, admits every thing that is well pleaded, and it is averred that 961*l.* 3*s.* 9*d.* for ſix years and a half's rent, was due and owing to the teſtator. That is a ſufficient averment that the lives continued ſo long, for otherwiſe ſo much rent could not be due. The implication is as ſtrong here as in *Cro. Jac.* 622. where the words *termino nondum finito*, were held to be a ſufficient averment of the exiſtence of the life, and in 2 *Lev.* 88. in cogniſance for rent by the bailiff of the tenant for life, an averment "that the rent was in arrear" was held ſufficient on a ſpecial demurrer.

This caſe was argued yeſterday, and this day *Yelverton* Ch. Baron, delivered the opinion of the Court.—In this caſe we are all of opinion that the demurrer muſt be over-ruled, and that judgment muſt be for the plaintiff. It is an action of covenant for rent arrear.—The plaintiff declares on a covenant contained in a leaſe for ſeven years, provided certain perſons mentioned in an article alluded to in the leaſe, and mentioned in the declaration, ſhould ſo long live. To this there is a general demurrer, and the only cauſe aſſigned at the bar is, that there is not a direct averment, that the lives named in the article were in exiſtence.

1787.
Moore
againſt
Moore,

exiſtence. I have looked into all the caſes that have been cited, and cannot find that a direct averment that the life was in exiſtence is at all neceſſary. The whole doctrine is laid down in 5 *Com. Dig.* Title *Pleader*. C. 66. Ld. Chief Baron *Comyns*, in laying down the law on this point begins thus: "An implication that a life continues is ſufficient" to ſupply the want of an averment, and puts ſeveral caſes of implication, one of which is directly in the point. The firſt is an ejectment for a rectory, if it ſhould be found that the rector *fuit & adhuc eſt ſeiſitus*, it is a ſufficient averment of his life. So in ejectment on a leaſe for years if the leſſee live ſo long, even the common words *quod ejecit termino nondum finito*, are a ſufficient averment of the life of the leſſor. So if the plaintiff claiming by leaſe from the tenant for life, ſay *virtute cujus fuit & adhuc eſt poſſeſſionatus*, it is ſufficient. So in conuſance as bailiff of huſband and wife ſeiſed in right of the wife who was tenant for life, to ſay that "the rent was in arrear" is a ſufficient averment of the life of the wife. That caſe is directly in the point, for in the declaration it is averred that 96 *l.* 3*s.* 9*d.* of the rent for ſix years and a half ending *May* 1782, was due and owing. Lord Ch. B. *Comyns* alſo cites 2 *Lev.* 88. which has been cited on both ſides, and Lord *Hale* there ſays, in *aretro exiſtente* is *quaſi* an averment, and good after verdict or on a general demurrer. *Twiſden* and another Judge held it well enough even on a ſpecial demurrer. This is in point, and meets the queſtion, where it is on a general demurrer.

Per Curiam. Demurrer over-ruled. Leave to plead refuſed.

Leſſee

1787.

Leſſee of D'Esterre v. Hart.

Same day. Leſſee of D'Eſterre *againſt* Hart.

Conſent for judgment in an ejectment the plaintiff may releaſe his damages and have execution for his coſts *de incremento*.

EJECTMENT for non-payment of rent, judgment by conſent, a writ of enquiry iſſued to aſcertain the damages, the jury found only 6*d*. damages, and 6*d*. coſts. Mr. *O'Neil* moved to ſet aſide the writ of enquiry and the finding, alledging as a reaſon that the officer had refuſed to iſſue execution for the coſts *de incremento*, as it was the practice in ſuch caſes, for the jury to find the amount of the bill of coſts in damages. Mr. *O'Neil* obſerved that the plaintiff might releaſe his damages and have execution without a writ of enquiry. *Lilly's Entries*, 506.

Power B. If that practice have crept into this court it is high time it ſhould be altered. It is not warranted by any principle of law, or the practice of any other court. The plaintiff, if he releaſe his damages, may have judgment without a writ of inquiry, and may have execution for his coſts *de incremento* as in common caſes. See what an injuſtice ſuch a practice occaſions; if the jury ſhould not chuſe to find the bill of coſts in damages, the plaintiff cannot recover them.

Telverton Ch. B. And if they ſhould find the coſts in damages, the plaintiff would nevertheleſs have a right by law to claim his coſts again.

Per Cur. Let the writ of enquiry be ſet aſide for having iſſued improvidently; let the plaintiff

1787. plaintiff releaſe his damages, and the officer iſſue execution for the coſts *de incremento* as in the uſual way.

KILBEE againſt GORE, Adminiſtrator of BROOKE.

Thurſday 10th May.

An adminiſtrator's pleading *non aſſumpſit* only, is an admiſſion of aſſets.

TO *aſſumpſit* on a bill of exchange drawn by the inteſtate, and indorſed to plaintiff, the defendant pleaded *non aſſumpſit* only. The plaintiff obtained a verdict and judgment *de bonis teſtatoris*. Upon a *fieri facias de bonis teſtatoris*, the ſheriff returned a *devaſtavit*, having held an inquiſition and charged the inqueſt to find a *devaſtavit*, he conſidering the plea of *non aſſumpſit* and judgment thereon as concluſive evidence of aſſets.

Mr. *R. Johnſon* moved to ſet aſide the finding for miſdirection. On the other ſide Mr. *O'Neil* and Mr. *Scriven* cited *Legate* v. *Pinchion*, *Cro. Jac.* 293. *Rock* v. *Leighton*, *Salk.* 310. Lord *Ray.* 589. S C. and *Ramſden* v. *Jackſon*, 1 *Atk.* 294. In *Cro. Jac.* 293, it was held that the plea of *non aſſumpſit* was an admiſſion of aſſets, and Lord *Coke* "willed the ſtudents to obſerve that that was then adjudged by all the Judges and Barons of all the Courts". In *Salk.* 310. it was held that if an executor confeſs, or ſuffer judgment by default he admits aſſets in his hands, and is eſtopped to ſay the contrary. And in 1 *Atk.* 294, where the queſtion was, whether *non eſt factum* admitted aſſets; Lord *Hardwicke* ſaid that he had ſeen Lord *Holt*'s report of that caſe of *Rock* and

and *Leighton*, where the very case was put by *Holt*, who said the law was the same as in the case of a judgment by default against an executor, tho' that is not mentioned in the report of the case by *Salkeld*; and Lord *Hardwicke* determined that *non est factum* did admit assets. 1787. Kilbee *against* Gore,

Yelverton Ch. Baron. This point is now too well established by the authorities that have been cited, to suffer it again to be agitated.

Per Cur. Motion refused.

Friday, 11th *May*.

ABBOTT, Lessee of PRITTIE against BUTLER.

Lessee of Prittie *against* Butler.

EJECTMENT on an *elegit*. At the trial objection was taken to the return of the *elegit*. The inquisition found *Dalton* the conusor of the judgment seized of certain towns and lands with the appurtenances, of the yearly value of 10l. &c. &c. The sheriff returned "one moiety of which said towns and lands with their appurtenances I have delivered to, &c. at the price and extent of 5l. to hold, &c. according to the form, &c." The question was saved for the opinion of the court, whether plaintiff was entitled to recover.

Delivery of a moiety without saying by metes and bounds, is a good return to an *elegit*.

Serj. *Fitzgerald*, Serj. *Toler*, and the hon. Mr. *Butler*. The delivery by the sheriff ought to be sufficiently particular to enable any future sheriff to deliver the possession, when the plaintiff shall have recovered in an ejectment founded thereon. There ought to be a description either by boundaries or by denomination,

1787.

Leſſee of Prittie *againſt* Butler.

nation, ſo as to give the party a right to enter on particular lands; otherwiſe the plaintiff, the other creditors and the debtor are left in a ſtate of uncertainty. The ſheriff ought to deliver one or more denominations found by the jury to be a moiety of the whole, or, if there be but one denomination, to deliver a moiety of it by metes and bounds. In *Pullen* v. *Birbeck*, *Carth.* 453. Lord *Holt* held that a return of a delivery of a moiety of an houſe without metes and bounds was ill. *In leſſee* of *Taylor* v. *Lord Abingdon*, *Doug.* 456. the objection was, that a moiety of each farm ſhould be extended and delivered, and 1 *Lev.* 160. was cited; but *Buller* J. ſaid that the argument in ſupport of that doctrine went not only to every farm, but to every cloſe and field; in ſhort, ſays he, "the writ could not be executed according to that idea but by delivering an undivided moiety—yet moſt clearly that is not the meaning of the ſtatute, for it is agreed the moiety extended muſt be ſet out by metes and bounds,"—1 *Vent.* 259. a return of a delivery not by metes and bounds was held bad. So *Hut.* 16.—1 *Brownlow* 38. *Dut. Sher.* 197.—*Lilly's Ent.* 216. correſponds with the return in *Doug.* and in *Raſt.* 262. the delivery is of certain denominations as a moiety of the whole.

For the plaintiff, Mr. *M. Smith*, Mr. *Hacket*. This return is not only warranted by law, but by the precedents. The beſt rule for the ſheriff to guide himſelf by, is the writ directed to him. The mandatory part of which is to deliver the moiety, and the return has purſued theſe words. It is ſaid that the ſheriff ought to have returned a delivery *by metes and bounds*, and

1788.

Leſſee of Prittie *againſt* Butler.

and that the want of theſe words, *by metes and bounds*, creates great uncertainty, but if theſe words had been inſerted the ſame uncertainty would ſtill remain. Formerly the ſheriff uſed to deliver actual poſſeſſion of the moiety in the firſt inſtance, and that probably gave riſe to the form of returning a delivery by metes and bounds; the practice is now in general otherwiſe; the caſe in *Carthew* does not involve that point; that metes and bounds are requiſite is a *dictum* of Lord *Holt*, and applies only to a houſe, in which it might be particularly neceſſary, as a tenancy in common of a houſe would occaſion great inconvenience. But in general they are not at all neceſſary; in ſome caſes they would abſolutely be abſurd. A reverſion may be extended as coming under the word *terra*. *Gilb. Execution*, 39. Could the ſheriff return that he had delivered a moiety of a reverſion by metes and bounds? Beſides after the filing of the return no objection can be made but what ſhews it to be abſolutely void—1 *Vent.* 259. 2 *Salk.* 563. and it is decided in *Dalis.* 26. that the return of a delivery without metes and bounds is good, and in *Raſt.* 262 there are precedents according thereto; and in this very court in *Michaelmas* 1784, leſſee of *Sibthorpe* and *Colles*, v. *Beſt.** it was determined, on a point

* *Goodtitle* leſſee of *Sibthorp* and *Colles* againſt *Beſt*. This came before the Court of *Exchequer* upon a point ſaved by Sir *Samuel Bradſtreet*, at *Kilkenny*, Spring Aſſizes, 1784, upon the trial of an ejectment on an *elegit*. The point ſaved was upon an objection made to the return, viz. that the delivery was not by *metes and bounds*. By the inquiſition were found the ſeiſin of *Caulfield* the conuſor, and the yearly value above repriſes of part of the town and lands of *Clone* in the poſſeſſion, &c. the like of *Rabeagh*; the like of *Acregare* (ſeverally) and alſo of and in that part &c. of *Clone*, *Rabeagh* and

1788.

Leſſee of Prittie *againſt* Butler.

point ſaved, that ſuch a return as the preſent was good.

Meige,

and *Accregare* in the ſaid county, &c. in the poſſeſſion of, &c. Upon which the ſheriff returned "The legal poſſeſſion of one moiety of all and ſingular the ſaid lands and premiſſes with the appurtenances, I the ſaid ſheriff, the day, &c. have cauſed to be delivered to *Robert Sibthorp*, in the ſaid writ likewiſe named at a reaſonable price and extent, to hold to him and his aſſigns as their freehold according to the form of the ſtatute in that caſe &c. until the debt &c. in the ſaid writ mentioned, ſhall be fully levied thereout, as by the ſaid writ I am required." In *Michaelmas* Term 1784, the court of Exchequer decided in favour of the plaintiff. This deciſion was recogniſed by Sir *Samuel Bradſtreet* in the caſe of *King* leſſee of *Keogh* v. *Finlay* B. R. *M.* 1786. 27 Geo. 3. and was there conſidered by the counſel as having ſettled that point. This laſt-mentioned caſe came before the court of *King's Bench* upon a point ſaved by Baron *Meige* at *Trim*, Spring Aſſizes 1786, upon the trial of an ejectment on an *elegit*. The inquiſition found that *Francis Foſter* the conuſor of the judgment, was ſeiſed of and in all that the weſt part of the town and lands of *Drinadaly*, and the town and lands of *Monkſtown* and *Oldcaſtle*, all ſituate, &c. in the county of *Meath* aforeſaid, &c. of the clear yearly value of 20 l. &c." upon which the ſheriff returned "a moiety of which ſaid town and lands, I the ſaid ſheriff have on the day of the caption of this inquiſition, cauſed to be delivered to the ſaid *John Keogh* in the ſaid writ named *by metes and bounds*, as by the ſaid writ hereto annexed, I am commanded and required." Upon the trial it was objected, That it was not found by the jury, that the part of the premiſſes of which the ſheriff has returned that he gave poſſeſſion to the leſſor of the plaintiff by metes and bounds is a moiety of the whole of ſaid premiſſes." A verdict was had for the plaintiff, ſubject to the opinion of the Court upon the point. It was argued on the 14th of *November*, 1788, by Mr. *Chamberlaine*, Mr. *R. Johnſon* and Mr. *Dunn* for the defendant, and by Mr. *Blackburne* for the plaintiff. For the defendant it was argued that the ſheriff might either deliver a moiety of the whole lands in common, in which caſe the conuſee muſt receive a moiety in value, and the value of the whole being found by the jury, it would thence appear how much he annually received in ſatisfaction of his debt; or the ſheriff might deliver a part in ſeveralty; but in ſuch caſe it ought to appear by the finding of the jury, that the part delivered was a moiety in value of the whole; that in the preſent caſe the return was of a delivery of a part in ſeveralty (by metes and bounds) but it did not appear that any part was delivered, found by the jury to be a moiety, ſo that it was the ſheriff extended the land delivered, and not the jury. They cited *Stat. Weſt.* 2. *c.* 18. 2 *Inſ.* 396. 2 *Vent.* 336. *Raſt. Ent.* 262. *a* & *b.* *Cliff's Ent.* 877, &c. *Lilly's Ent.* 211. 574. *Doug.* 456. 2 *Salk.* 563. *Lord Raym.* 346. 718. *Daliſon* 26. 28. *Theſ. Brev.* 93. & *Dalton's Sheriff*, & *Dutton's Paſſim.* For the defendant, it was argued that the plain conſtruction of the act *Weſtm.* 2. *c.* 18. is that the jury are to value the whole, and the ſheriff to deliver the half. That this

1788.

Leſſee of Prittie *againſt* Butler.

Metge, Baron. I cannot conſider this queſtion as one that ought to be now argued in this ſhape, it is not *res integra*. I remember the caſe of *Sibthorpe* and *Colles*, v. *Beſt*, was ſolemnly argued, and the court unanimouſly determined that this was not a fatal objection to the return. If that determination be to be annulled, it ſhould be by a bill of exceptions or upon a conference with the judges.

Hamilton, B. Of the ſame opinion.

Power, B. I recollect that I was ſitting for the Chancellor when that caſe came before this court; I have not as yet made up my mind upon the point.

Yelverton, Ch. B. When the court determined the caſe of the leſſee of *Sibthorpe* and *Colles* againſt *Beſt*, we declared that we would not ſuffer the antient mode to be diſturbed; therefore, even if it ſhould be now neceſſary to alter it, the preſent leſſor of the plaintiff ought not to be affected by any determination we may hereafter come to. In order to ſettle this matter, we muſt confer with the judges, and if it ſhould appear that the inconveniencies

this had been decided in *Cro. Car.* 319. That the ſheriff is to be preſumed to have done his duty and delivered a moiety in value, until the contrary appear, and that in all caſes he is ſuppoſed to have made a ſeverance of the moieties. That this return is agreeable to *Coke's Ent.* 397. 398. and the general courſe of returns in this court, and in the Common Pleas. The Court (Lord *Earlsfort*, Ch. J. *Robinſon*, *Henn*, and Sir *Samuel Bradſtreet* J.) held that the words metes and bounds did not vitiate and render the return a nullity. 2dly, That the objection was not to be made at the trial; that it was then to be preſumed that the ſheriff had executed the writ as he ought, by delivering a moiety in value. Sir *Samuel* obſerved that the defendant was not a mere ſtranger, for he claimed under *Foſter*, who might have come in, and conteſted the return. N. *Foſter* had become bankrupt, and *Finlay* purchaſed from his aſſignees.

Poſtea to the plaintiff.

which

1787.

Leſſee of Prittie *againſt* Butler.

which Serjeant *Toler* has ſuggeſted do really ariſe from the preſent form of the return, it will be right to fix on one that may be leſs exceptionable, that it may be adhered to by all the court; and we will declare what form may, in conſequence thereof, be to be obſerved in future.

Monday, 14th May.

Leſſee of Stannard *againſt* Caſual Ejector.

Leſſee of STANNARD and LETSOM, *againſt* the Caſual Ejector.

Liberty to take defence to an ejectment refuſed; the party applying having lain by a year after the *habere* executed.

JUDGMENT in ejectment for non-payment of rent was obtained by default, and an *habere* executed on the 1ſt of *May* 1786. A motion for liberty to ſet aſide the judgment, and to take defence, was now made on behalf of a third perſon, who ſwore that he had title to the lands, and had had no notice of the ejectment till the execution of the *habere*; but he aſſigned no cauſe for not having made an earlier application, and on that account the motion was refuſed.

Tueſday, 15th May.

Sharp *againſt* Corrigan.

SHARP leſſee of M'CUSKER, *againſt* CORRIGAN.

Nonſuit for not appearing to confeſs leaſe, entry and ouſter ſet aſide becauſe the notice of trial was entitled as againſt the caſual ejector inſtead of the real defendant.

UPON Mr. *Cantwell*'s ſhewing cauſe why the nonſuit, for not appearing to confeſs leaſe entry and ouſter, ſhould not be ſet aſide, it appeared that the notice of trial was entitled "*James Sharp*, leſſee of *M'Cuſker*, againſt *Thruſtout the caſual ejector*.

Yelverton, Ch. B. In the notice for trial it is ſaid *this cauſe being now at iſſue*. Was the cauſe

cauſe between the plaintiff and the caſual ejector at iſſue? After defence taken no further proceedings are had upon the original declaration. If we ſhould not ſet aſide the nonſuit, we ſhould eſtabliſh this to be a good form of notice of trial in all ejectments, and we ſhould have every ejectment end in this manner.

1787. Sharp *againſt* Corrigan.

Per. Cur. Rule for ſetting aſide the nonſuit made abſolute.

Same day. White *againſt* Barry.

WHITE *againſt* BARRY.

Civil proceſs may be ſerved on a priſoner under a criminal proſecution without the leave of the court, if it do not obſtruct the Crown proceſs.

MR. *Sankey* ſhewed cauſe why the defendant ſhould not be diſcharged out of the cuſtody of the Sheriff of *Cork*, he having been ſerved with meſne proceſs, while in cuſtody on a criminal proſecution without the leave of the court. The cauſe ſhewn was, that the ſerving of the civil proceſs did not obſtruct that of the crown, the defendant having been tried and acquitted.

Mr. *O'Neil* and Mr. *Harnet*, *contra*. In *M'Donald's* caſe, *Foſter* 61. 2 *Black. Rep.* 30. the motion to diſcharge the civil proceſs was refuſed, becauſe the plaintiff had previouſly obtained a judge's order to ſerve it. All the caſes ſhew that to charge a priſoner on a criminal proſecution with a civil action, leave muſt be previouſly obtained, and this even in *Dyer's* time. Civil proceſs ſerved without leave muſt therefore be void, otherwiſe a motion for liberty would be abſurd. There is no reaſon why a creditor ſhould be put into a better ſituation

1787.

White *against* Barry.

by means of the crown proceſs, than he would have been otherwiſe.

Yelverton, Ch. B. The rule is, that if the civil proceſs interfere with that of the crown, the leave of the court muſt be obtained before it can be ſerved; and that rule ſeems ſo reaſonable that we ought not to alter it; it has been frequently ſo decided in this court. We lately attached a ſheriff for returning *non eſt inventus*, when the defendant was in his goal.

Per. Cur. Allow the cauſe.

Same day. Wheeler *againſt* Bowerman.

WHEELER *v.* BOWERMAN.

Debt on bond conditioned for performance of covenants, breach aſſigned. Verdict for plaintiff without finding damages. Plaintiff allowed to enter judgment for the penalty.

DEBT on a bond conditioned for the performance of covenants in a leaſe therein mentioned; penalty 227l. Plea, performance. Replication that the defendant had covenanted to deliver up poſſeſſion on the 25th of *March* 1786, and that he did not. Rejoinder, that the defendant was on the lands ready to give them up, and is now ready. Surrejoinder joined iſſue thereon. At the trial no witneſſes were examined, and the iſſue lying on the defendant there was a verdict for the plaintiff. The finding of the jury was, "we find for the plaintiff, with 6d. coſts. The officer had refuſed to enter up judgment on the *poſtea* without a ſpecial direction from the court.

Mr. *Emmet* moved that the officer ſhould enter up judgment for the plaintiff, and iſſue execution for the whole ſum declared for; for the plaintiff having declared in debt, if the verdict be found for him he muſt recover the whole

1787.
Wheeler *againſt* Bowerman.

whole ſum, and have execution for it. The ſtatute 9 *W.* 3. *ſ.* 1. c. 35. does not *oblige* the plaintiff to ſuggeſt a breach and go for damages to be aſſeſſed by the jury. The remedy given by that ſtatute is only *accumulative*. In *Dry* againſt *Bond*, *T.* 16 & 17 *G.* 2. *Bull. niſi prius* 174. (*Dub. Ed.* 1773,) it was held that notwithſtanding this ſtatute, the plaintiff may have damages only *occaſione detentionis debiti*, and take out execution for the penalty. If the action had been in covenant, there is no doubt we ſhould be precluded from having execution for more than the damages found by the jury. At all events the plaintiff is entitled to have judgment for the penalty, which the ſtatute expreſsly directs to be entered up as heretofore.

Per. Cur. Let the plaintiff enter up judgment for the penalty, he may afterwards proceed as he may be adviſed at his peril. § No coſts the application having been made neceſſary from the doubts entertained by the officer.

§ Vide Cowp. 357. 2 Wils. 377, Comyns Rep. 376. Sayer on damages 67.

Saturday, 19th May.
Ex parte Grierſon.

Ex parte GRIERSON petitioner *againſt* WALSH, an Attorney.

Declaration on a bond for an untaxed bill of coſts, refuſed to be on that account ſet aſide; but the bill ordered to be taxed, and the bond to ſtand a ſecurity for the taxed bill.

MR. *Caldbeck* moved upon the petition to ſet aſide the declaration filed by the reſpondent, upon a bond paſſed by the petitioner to him for the amount of his bill of coſts untaxed; the reſpondent having refuſed to deliver up papers which the petitioner was much

1787.

Ex parte Grierſon.

in want of, till he had conſented to give that bond; and afterwards the reſpondent refuſed to ſubmit to a taxation.

Yelverton, Ch. B. This practice of taking ſecurity for bills of coſts untaxed does not deſerve countenance or indulgence. We will make no rule upon that part of the motion which goes to ſetting aſide the declaration. But let the coſts be taxed, and let the proceeding in the mean time be ſtayed, and be as a ſecurity for what ſhall appear to be due on the taxation.

Same day. Scallion, leſſee of Bowen *againſt* Read.

SCALLION leſſee of BOWEN *againſt* READ.

Defendant in a former ejectment need not pay the coſts of it, before he can proceed in another brought by himſelf in a different court.

READ had recovered in ejectment in the court of King's Bench againſt the preſent leſſor of the plaintiff. Mr. *R. Johnſon* now moved on behalf of the defendant, to ſtay proceedings in this cauſe, till the coſts which the preſent defendant was entitled to in the King's Bench ſhould be paid.

Mr. *Caldbeck*, *contra*. This is a novel application. Where the plaintiff has tried his chance in one court and fails, and then goes into another court, it is fair to ſtay his proceeding till he ſhall have paid the coſts of his former experiment; but in the preſent caſe, the plaintiff here was the defendant in the court of King's Bench.

Yelverton, Ch. B. There never was ſuch a motion allowed.

Per Cur. Motion refuſed* with full coſts.

FAY

* 4 Mod. 379. Roberts v. Cook, S. P.

1787.

Monday, 21ſt May.

FAY *againſt* M'CLENAGHAN.

Fay *againſt* M'Clenaghan.

PER. CUR. (upon Mr. *Hodgkinſon's* motion) There muſt be bail given at bar upon defendant's removing the cauſe by *habeas corpus*.

Defendant on removing cauſe by *habeas corpus*, muſt give bail.

Same day.

LYNCH *againſt* LYNCH.

Lynch *againſt* Lynch.

MR. *Attorney General* moved to ſet aſide exceptions to the Chief Remembrancer's report, as not warranted by objections made before the officer.

That exceptions to a report are not warranted by objections before the officer, is to be taken advantage of on arguing them, not by a motion to ſet them aſide.

Serjeant *Fitzgerald* ſame ſide, ſaid, If the objections had been made before the officer, they might have been anſwered or allowed; and cited *Bunb.* 93. 1 *Howard Eq. Excheq.* 38.

Power, B. I never knew an inſtance of ſuch a motion. We admit the principle, but this is not the time to apply it. The objection ſhould be made on the hearing, not on motion, This is an experimental one.

Per Cur. Motion refuſed with coſts.

End of EASTER TERM.

Trinity

1787.

Trinity Term. 27. *Geo.* 3. 1787.

MEMORANDUM. In this term *James Fitzgerald*, Esq; his Majesty's second Serjeant, was appointed Prime Serjeant, in the room of the Honourable *James Brown* resigned. *John Toler*, Esq; third Serjeant was appointed second Serjeant in his room, and the Honourable *Joseph Hewitt* was appointed third Serjeant.

Exchequer.

Tuesday, 12th June.

O'Brien *against* English.

O'Brien *against* English.

Objections to an officer's report upon an interlocutory order are to be made by moving to set it aside, upon a final order by excepting.

THE plaintiff had been ordered to answer interrogatories as upon an attachment; the interrogatories had been referred to the officer, who reported some of them to be irrelevant. Defendant excepted to the report; and now Mr. *Lloyd* moved, that the exceptions should be set down to be argued in the usual way. But *per. cur.* This application is irregular; where there is a report upon an interlocutory order you should move to set aside; where upon a final order, you should except. This report is upon an interlocutory order.

Motion refused.

WILLIAM

1787.

Same day. Orr *againſt* Vipon.

WILLIAM and JOHN ORR *againſt* ELIZABETH VIPON.

Verdict againſt defendant as indorſer of promiſory notes ſet aſide upon objections to the evidence.

THIS was a motion to ſet aſide a verdict for plaintiff, found the 1ſt *December* 1786, before the Chief Baron. The action was brought againſt defendant as indorſer of five promiſory notes, bearing date 28th *June* 1782, made by *David Lyons*, payable to defendant (who was his wife's ſiſter) at different days. The declaration contained other counts, for goods ſold and delivered, &c. *Turnbull* the firſt witneſs for the plaintiff, ſwore, that theſe notes were delivered by *David Lyons's* brother to the plaintiff (with the name of *Elizabeth Vipon* thereon as indorſer) in payment for goods that had been ſold by the plaintiffs to Mrs. *Lyons* (the wife of *David*) in the preſence of the defendant. That the plaintiffs gave a receipt for the amount of the notes, (ſpecifying them) "which when paid were to be in full for the bill." The witneſs ſaid, that he could not tell whether the name indorſed was in the hand writing of the defendant or not: but he ſwore that in two or three days after the plaintiffs had taken the notes, the witneſs produced them to her in her ſhop, and ſhe acknowledged the indorſement to be hers, adding that ſhe was ſurpriſed that the plaintiffs could doubt it. That within two or three days after the firſt was due, he applied to *D. Lyons* for payment, which was refuſed, and on the ſame day, as

1787.
Orr
againſt
Vipon.

as well as he could recollect, he applied for payment to the defendant, who ſaid that ſhe would pay the note if plaintiffs would give her time. He ſwore the ſame in ſubſtance with reſpect to the ſecond and third notes. But before the fourth had become due, *David Lyons* had abſconded; *then* (ſaid the witneſs) *the defendant began to deny that they were her indorſements.* The ſecond witneſs ſwore that he knew the handwriting of the defendant, and believed the indorſements to be in her handwriting; that ſhe had paid ſeveral notes with indorſements in the ſame handwriting. For the defendant, her clerk ſwore that he had lived with her in that capacity ever ſince the year 1773; that he had ſeen her write, knew her writing, and believed the indorſements not to be in her hand writing, but in that of Mrs. *Lyons*, whoſe writing he alſo knew. That on the 26th of *January* 1783, he went to the plaintiffs to pay 15l. the balance of an account due by the defendant to them, for which he was deſired to require a receipt in full, which they refuſed to give, alledging that 334l. was due to them by defendant, but whether on account of theſe notes or not, he could not tell. That after *January* 1783, a perſon from one *Hinds* who had diſcounted one of the notes, called on the defendant for payment, which ſhe refuſed, alledging that the indorſement was not hers; he could not tell whether this was after *Lyons* had abſconded or not. But in his croſs examination he admitted, that he believed the defendant never denied the indorſements till after *Lyons* had abſconded. Miſs *Groſe*, defendant's ſecond witneſs, ſaid ſhe had lived with defendant four years as her ſhop woman; ſhe ſwore that

1787.

Orr *againſt* Vipon.

that all that *Turnbull* had depoſed was falſe, for that during all that time ſhe never was abſent from the ſhop, when open, long enough for the tranſaction which he had ſworn to, to happen; and that ſhe never had ſeen him there: that the indorſements were not in the defendant's hand writing, which ſhe well knew. On her croſs examination, to account for the plaintiffs receipt to *Lyons* being in defendant's poſſeſſion, ſhe ſaid that Mrs. *Lyon*'s, after her huſband's abſconding, had ſent it to the defendant with other papers, to enable her to defend herſelf againſt any demand the plaintiffs might make on her for goods delivered to *D. Lyons*. This witneſs alſo undertook to ſwear that the defendant never had acknowledged the indorſements to be hers, or promiſed to pay the notes. To controvert this, a paper was produced, which *Turnbull* ſwore that he had himſelf received from Miſs *Groſe* in the plaintiff's ware-room; that ſhe delivered it as from the defendant. This paper, which was read at the trial, expreſſed the defendant's compliments to the plaintiffs, and that ſhe had heard that her name had been put to ſome notes without her privity, but that ſhe would conſent to acknowledge the indorſements and pay the amount, if they would give her time. Miſs *Groſe* denied the whole of this tranſaction.—The jury found a verdict for the amount of the notes and of the goods ſold and delivered to the defendant.

Upon a motion to ſet this verdict aſide, upon objections made to the evidence applied to the notes, Mr. *Duquery*, Mr. *Curran*, Mr. *Finucane*, and Mr. *Butler*, argued laſt term for the defendants, and Mr. *Calbeck*, the Recorder

1787. Orr against Vipon.

der, and Mr. *Emmet* for the plaintiffs. Upon this day (the 12th *June*) Barons *Power*, *Hamilton* and *Metge*, gave their opinions for ſetting aſide the verdict.

Power, B. This is an action brought by the plaintiffs againſt the defendant as indorſer of five promiſory notes made by one *D. Lyons*, brother-in-law of defendant, payable to the defendant, and having her name indorſed. There is a verdict for the plaintiff for 240l. 4s. 6d. There has been a motion for a new trial upon objections to the verdict, merely ſo far as relates to the promiſory notes; for there were other counts. Upon the trial it appeared that *D. Lyons* was indebted to the plaintiffs in 195l. 17s. 6½d. to diſcharge which, on the 28th *June* 1782, the brother of *D. Lyons* delivered to the plaintiffs five promiſory notes, ſigned by *David Lyons*, payable at different times to the defendant, and with defendant's name indorſed; (and it is obſervable that the five notes amount to the preciſe ſum which had been due to the plaintiffs by *D. Lyons*,) and the plaintiffs, at the time when they took them, gave the uſual and ordinary receipt on the foot of the account; which is clear evidence that they were received by the plaintiffs in the uſual manner in diſcharge of the debt due to them. Though defendant appeared to be a trader in this city, no attempt was made on the trial on the part of the plaintiffs to prove the indorſements to be her hand-writing, by any one who had ſeen her write or received letters from her in the courſe of correſpondence. The defendant did not negociate the notes. She received no value whatſoever for them. They paſſed from *Lyons* the maker, and to him only the

1787.

Orr against Vipon.

the plaintiffs had given value. The indorſements were proved by two witneſſes to be the hand-writing of Mrs. *Lyons*, and not that of the defendant herſelf. The plaintiffs appeared to have been reſiding, and the notes were negociated in the ſame city, where the defendant lived, and carried on trade; and yet no enquiry was made of the defendant, whether the indorſements were hers, previous to the plaintiffs acceptance of the notes. But it was ſworn by one witneſs (*Turnbull*) that he was clerk to the plaintiffs; and that two or three days after the plaintiffs had accepted of the notes, and paſſed the receipt before mentioned, he applied to her to know whether the indorſements were hers. He ſwore that ſhe admitted that they were; and added that ſhe was ſurpriſed that any doubt could be entertained of it. By another witneſs it was proved that defendant had paid notes with indorſements of her name in the ſame hand writing, as that in which theſe indorſements were; and on the croſs examination of one of the defendants witneſſes, it appeared that defendant did not deny theſe indorſements until after *Lyons* had abſconded. Theſe are the facts, ſuch as are material, as I collect from my Lord Chief Baron's report. Upon this evidence the jury found for the plaintiff, and the queſtion now is, whether this verdict ſhall be concluſive againſt the defendant for ever, or whether from the nature of the caſe under all its circumſtances, there ought to be an opportunity given of having it reconſidered, by granting a new trial, I am of opinion there ought to be a reconſideration. The defendant was ſued as indorſer of five promiſ-

ſory

1787.

Orr *againſt* Vipon.

ſory notes. The queſtion for the jury therefore, and the only one (ſo far as relates to the notes) was; did ſhe indorſe them or not, either by ſubſcribing her name herſelf, or by ſome other perſon by her direction, or with her privity and conſent? Becauſe in either of theſe caſes, tho' not her *hand-writing*, it was as much her indorſement as if ſhe had written it herſelf. Independent of her acknowledment, there was no legal evidence to go to the jury in ſupport of this action, ſo far as relates to the notes. If before the plaintiffs accepted of them, they had ſent to the defendant and ſhe then acknowledged the indorſement, in that caſe, evidence to prove it a forgery ought not to have been admitted at the trial. But tho' the application here was after the receipt of them by the plaintiffs, ſtill the evidence of her acknowledgment was evidence to go to the jury that it was her indorſement. And if there were clear and ſatisfactory evidence of either fact, either that ſhe wrote the indorſement, or that Mrs. *Lyons* did it with her privity and conſent, the verdict is right, and there ought not to be a new trial. But, to me, ſo far from being clear and ſatisfactory, the tranſaction appears dark and obſcure, accompanied with the ſuſpicious circumſtance of one ſingle witneſs ſwearing to an acknowledment two or three days after the receipt of them, without accounting why the application was made then and not before. This alone, in my mind, would be ſufficient to demand a more ſolemn conſideration. But another queſtion was proper for the jury, namely, whether the plaintiffs uſed due diligence, in not applying to the defendant, whoſe hand he

1787.
Orr
againſt
Vipon.

he did not know, before the notes were accepted. That will be a conſideration at a ſecond trial. At all events, it muſt be confeſſed that the evidence of a ſingle witneſs ſwearing to an acknowledment is evidence which ought to be received with great caution, eſpecially where there was no attempt to prove the indorſement in the uſual manner.—I do not ſee who can be ſafe, if a ſingle witneſs ſwearing to an acknowledment after acceptance ſhall be received as of courſe, as evidence of an indorſement, in any caſe, but particularly under the circumſtances of this caſe where at leaſt the weight of evidence (if it was not fully proved) was, that the indorſement was the hand writing of another. Again; the examination in this caſe appears to have been long; the trial laſted till twelve at night; the attention of the jury might have been diſtracted and confounded by ſuch a long examination, and diverted from the real and only queſtion, whether it was her indorſement? by the arguments of counſel to make it appear that it was a contrivance of Mrs. *Lyons* in colluſion with the defendant; and if the verdict was found on any conſideration whatſoever but her having actually or virtually made the indorſement, the jury was miſtaken in point of law, and the verdict ought not to ſtand. But the ground and foundation of the verdict do not appear at this day, and in every commercial queſtion it is of importance, that the ground and foundation upon which it is decided ſhould be known. Upon a ſecond conſideration the very ſame jury might perhaps find another way, when directed to the proper object; for I do not go into

1787. Ort against Vipon.

nto the merits at all. In my opinion, if any one of the objections which I have ſtated occur, an opportunity ought to be given of reconſidering the caſe; which can only be done by a new trial. But when the caſe is conſidered under all its circumſtances; it being a commercial queſtion; of great value, and the ſuſpicious complexion it bears, independent of the merits, of which I give no opinion, I think there ought to be a new trial; and even formerly, when new trials were leſs liberally granted than now, objections not ſo ſtrong as theſe have induced the court to grant new trials.

Hamilton Baron, In my apprehenſion, the preſent caſe does not fall within one, but ſeveral, of the rules by which the diſcretion of the court is governed in granting new trials. The reaſons for granting them are very various; ſeveral of them are very ably laid down by Lord *Mansfield*, in the caſe of *Bright* againſt *Eynon*, 1 *Bur.* 391. I will repeat his words, "A general verdict can only be ſet right by a new trial, which is no more than having the cauſe more deliberately conſidered by another jury, when there is a reaſonable doubt, or perhaps a certainty, that juſtice has not been done. There are numberleſs cauſes of falſe verdicts without corruption or bad intention of the jurors. The caſe may be intricate, the examination may be ſo long as to diſtract and confound their attention; the parties may be ſurprized by a caſe falſely made at the trial, which they had no reaſon to expect, and therefore could not come prepared to anſwer. If unjuſt verdicts obtained under theſe and a thouſand like circumſtances were

1787.

Orr against Vipon.

were to be concluſive for ever, the determination of civil property by this mode of trial would be very precarious and unſatisfactory. It is abſolutely neceſſary to juſtice that there ſhould upon many occaſions be opportunity given of reconſidering the cauſe by a new trial; and it is done in a way very favourable to the party for whom the wrong verdict is given; it is upon payment of coſts." And Lord *Mansfield* concludes with obſerving that the ſame jury might, upon a reconſideration find a different verdict. Theſe were the ideas alſo of Lord *Holt*, in 12 *Mod.* 348. Lord *Peterboro's* caſe.

Now let us compare the preſent caſe by thoſe rules, or ſome of them. This action is brought againſt the defendant as indorſer of promiſſory notes. The declaration avers that ſhe by indorſements in her own hand writing, ordered the contents to be paid. Therefore what was the defendant *prima facie* to ſuppoſe the plaintiff would endeavour to make out at the trial? That ſhe had actually indorſed the notes! See by what evidence the actual indorſement was attempted to be proved, for the plaintiff did not go wholly or in the firſt inſtance on a conſtructive indorſement, for the firſt witneſs ſwore to an acknowledgment of the hand writing. Is that the common way of proving a hand writing? Is it by an acknowledgment? by no means. How then ought an indorſement to be proved? The actual indorſement is to be proved by one who has ſeen the perſon write and knows the hand writing. Here ſecondary evidence was offered inſtead of the primary without any account given for it. If the party lived abroad, there

1787.
Orr
againſt
Vipon.

there would be ſome reaſon for it; but here the parties all lived in the ſame neighbourhood. I muſt here obſerve, that evidence of an acknowledgment is of all others of the moſt ſuſpicious nature and dangerous tendency; if it be admitted in the full extent; what has a dangerous man to do but prepare a writing adapted to his purpoſe, and get a witneſs to ſwear that the defendant acknowledged it, and he will have proved his caſe. Therefore I ſay this kind of evidence is to be received with the greateſt caution, and therefore on this ground I think this caſe ought to be reconſidered.—Now let us ſee how is the conſtructive endorſement attempted to be proved. Not by a witneſs who was preſent when the defendant gave Mrs. *Lyons* directions to ſign her name; or that ſhe was in the habit of permitting Mrs. *Lyons* to ſign her name; but that the witneſs had ſeen her pay notes with her name endorſed on them in a ſimilar hand writing. But that does not go to the fact which ought to have been proved, and therefore there is great room to ſuppoſe that that has occurred here, which Lord *Mansfield* ſays is one reaſon for granting new trials, viz. ſurprize. For tho' I admit it might be the ſame in point of law, whether the defendant indorſed the notes herſelf or by another perſon; yet in point of evidence it is very different. Therefore on this ground alſo, I think there ought to be a new taial. But there is reaſon to think, that other matters did go to the jury, which did not apply to the iſſue, and which ought not to have been ſubmitted to them, namely, evidence of colluſion between the defendant and her ſiſter, from which they might have

1787.
Orr against Vipon.

have concluded that it was more fit, that the loſs ſhould fall on her who had been guilty of colluſion, than upon the plaintiff who was an innocent perſon; and it is impoſſible to tell what was the prevailing ground with the jury. Another piece of evidence was read (I preſume from the length of the trial and the fatigue every one had undergone) which did not apply to the iſſue, and which muſt have had great weight with the jury; that was a written note ſuppoſed to be ſent by the defendant to the plaintiff denying the indorſements, but offering to pay the notes, if time were allowed her. Now that evidence goes to ſupport entirely a different head of action, and leads to a different conſideration, namely, whether it was a collateral or direct undertaking, and whether there was a ſufficient conſideration to make the promiſe binding. Therefore, not only becauſe the caſe turned out differently from what defendant had reaſon to expect, but becauſe evidence was given which did not apply, and the jury did not conſider it on the proper ground, I am of opinion, there never was a caſe more proper for a new trial.

Metge, Baron. Though I admit that this action, ſo far as it relates to the notes in queſtion, can only be ſupported on the ſtatute of *Anne*, yet I do not think that that ſtatute preſcribes any particular kind of evidence. Conſidering this caſe upon the evidence directly and immediately applicable to the iſſue, I do not think the court is warranted to ſet aſide this verdict either as being againſt evidence or againſt law. The ſingle queſtion was, whether the indorſements were the defendant's or

1787.

Orr *against* Vipon.

not; and I do agree with my brother *Power*, that they are equally to be conſidered as her's, whether written by herſelf, or by any perſon authorized by her. Let us conſider the evidence. One *Turnbull* was produced; and he does not appear to have been a witneſs undeſerving of credit. His teſtimony was not impeached, and there were ſome circumſtances which confirmed the account he gave. He ſwore that the defendant acknowledged the indorſements to be her's, and that evidence if believed is ſufficient to ſupport the action; and there are, as I before obſerved, circumſtances to ſtrengthen and fortify it. It was oppoſed by that of Miſs *Groſe*, who ſwore that all that *Turnbull* had ſworn was falſe. That aſſertion does not demand ſuch belief as ſwearing affirmatively to the fact; and it is a rule to reconcile contradictory evidence if poſſible; for the benignity of the law never ſuppoſes wilful perjury. Now if you miſbelieve *Turnbull*, you muſt believe that he was wilfully perjured. But you may miſbelieve Miſs *Groſe* without ſuppoſing her guilty of wilful perjury. What ſhe has ſworn might have been ethically true, though not logically. She might have believed it herſelf to be true, though it were really not ſo. There is nothing elſe to contradict *Turnbull's* evidence; for the evidence that it was not the defendant's hand-writing does not, by any means; on the contrary, it rather confirms his teſtimony; for the witneſs ſwore that he could form no opinion of her hand-writing. If this evidence were true, it was ſufficient to ſupport the action, and ſo I underſtand the charge to have been. But there were other circumſtances. A witneſs on the part of the defendant

dant ſwore that the firſt time ſhe denied the indorſements was after *Lyons* had left the kingdom three months. That ſupports the evidence of *Turnbull*; and to the jury alone belongs the right to judge of the credibility of witneſſes. The judge left it to the jury; and I think he was right in charging the jury that if they had any doubt, they ought to lean againſt the defendant, provided they ſhould think that ſhe had acted colluſively. That charge I underſtand thus—If you think the evidence of the indorſement is in *equilibrio*, you will rather believe what comes from a pure ſource than a polluted one. Therefore I am of opinion that the verdict cannot be ſet aſide as againſt evidence or law; and indeed I am fortified in this opinion by Mr. *Curran's* argument, who admitted that it could not be ſhaken on either of theſe grounds; and in my opinion he put it on a ground which is the only one that could raiſe a doubt in the minds of the Court—namely, that the jury might have been influenced by extraneous matter; I do feel that doubt; for a paper was read which I think might have operated on the minds of the jury: it is true, it was not read that the contents of it might be evidence to ſupport the iſſue, but merely for the purpoſe of confronting the two witneſſes, *Turnbull* and Miſs *Groſe*. But yet it was read, and being ſo, I have a doubt, whether its contents might not have had ſome influence on the minds of the jury, and ſeemed to have conveyed, in their ideas, a kind of promiſe upon which they might have founded their verdict; upon this ground I think there ought to be a ſecond trial.

1787.
Orr
againſt
Vipon.

1787.

Orr *againſt* Vipon.

Velverton, Lord Ch. B. concurred with his brethren in thinking this a fit ſubject for the conſideration of a ſecond jury.

Rule for a new trial made abſolute.

Tueſday, 19th *June*.

Bell *againſt* Clarke.

BELL againſt CLARKE.

Defendant putting a rule on plaintiff to ſhew cauſe of bail, waves the objection to the want of an affidavit to warrant the writ.

MR. A. *Smith* moved to ſet aſide the *capias quo minus* with the proceedings thereon, for want of an affidavit to warrant the writ, which was marked for 35l. 8s. 6d. for goods ſold and delivered.

Mr. *Blackburne contra*. The defendant has waved the irregularity by putting a rule on the plaintiff to ſhew cauſe of bail.

Per Cur. This application is too late. The proceeding was certainly wrong in the outſet; but the defendant has waved the irregularity. He ought to have made this objection before he put the rule on the plaintiff to ſhew cauſe of bail.

No rule.

Same Day, Kelly *againſt* Quin.

KELLY againſt QUIN.

By practice of the Exchequer, the party ſucceeding in the event, is not entitled to his coſts on a *remanet*?

MR. *Finucane* for the plaintiff, moved that the officer ſhould tax plaintiff's coſts on bringing down the record, whereon a *remanet* was entered *pro defectu juratorum*. He ſtated that plaintiff had prayed a *tales*; that the cauſe was tried

tried at the subsequent assizes, and plaintiff got a verdict. He cited in support of this motion, 4 *Bur.* 1987. 5 *Bur.* 2694.

1787.
Kelly against Quin.

Mr. Attorney General *contra*, said those cases are of no authority to decide the practice; he would be very sorry to see the practice as laid down by *Master Burrow* in some cases, adopted in the Courts of this kingdom; as the practice upon attachments to cram down interrogatories, though the party confesses the contempt and submits to the judgment of the court, 2 *Bur.* 796. 4 *Bur.* 2105. This practice he said was very justly reprobated in the Court of King's Bench in this kingdom, a few days ago, in the case of *King* v. *Read* *; and that he hoped the practice as now cited, would share the same fate here.

The officer (Mr. *Farren*) reported that the practice was, not to allow the costs of a *remanet*; that in such cases each party abides by his own. To this the court seemed to agree; but as the record of the *remanet* was not produced, which the court thought necessary to ground the motion upon, they made no rule,

* Vide this case *post*.

Lessee

1787.

Same Day, Leſſee of Bernard *againſt* Brownrigge. Six months having elapſed ſince execution in ejectment for non-payment of rent; a mortgagee of the tenant's intereſt, upon payment of the arrear and coſts to the landlord, before the expiration of nine months after execution, is put into poſſeſſion.

Leſſee of Bernard and others, againſt Brownrigge.

EJECTMENT for non-payment of rent. Execution had been executed, and the ſix months had elapſed. Mr. *Chamberlain* moved, on behalf of a mortgagee of the tenant's intereſt, that a writ of reſtitution ſhould iſſue, to put the mortgagee into poſſeſſion; on an affidavit of the mortgage, and that the nine months allowed the mortgagee to redeem in, had not expired, upon payment of the arrear of rent, &c. The plaintiff's attorney conſented on behalf of his client; and it was ſo ruled *per Cur.* without farther motion.

Thurſday, 31ſt *June*. Gould *againſt* Adams.

An annuity deviſed to debtor of teſtator is not to be withheld to diſcharge the debt, for the deviſe extinguiſhes the debt.

Gould againſt Adams, and the contrary.

THE original bill was filed for the arrears of an annuity deviſed to the plaintiff by his brother *Michael Gould*; and to have it decreed a charge upon the lands made ſubject thereto by the will of the teſtator. The teſtator in the year 1764, had become ſecurity for the plaintiff upon his being appointed hearth-money-collector; and on the 12th of *April* 1780, he was obliged to pay for him 392l. 10s. *Michael Gould* had made a will in 1779, in which he deviſed an annuity of 100l. to the plaintiff for his life, but having been obliged, as ſecurity for plaintiff, to pay that deficiency, he made a new will in 1782 and therein deviſed to plaintiff an annuity

annuity of only 50l. for life. The defendants, as his repreſentatives, got into poſſeſſion of his eſtates, but refuſed to pay the annuity until the plaintiff ſhould diſcharge that debt of 392l. 10s.

1787. Gould *againſt* Adams.

Mr. Solicitor General *(Wolfe)* for the defendants, ſaid, as there were minors concerned, his clients deſired merely to have the opinion of the Court upon the preſent queſtion which was this: when a creditor deviſes an annuity to his debtor, whether the deviſe is an extinguiſhment of the debt?

2 *Salk.* 508. 2 *Eq. ab.* 350. 2 *P. Wms.* 128. & *Brown & Selwyn. Cas. temp. Talb.* were cited.

Yelverton, Ch. Baron. Where a man makes a will and leaves a legacy, it is *primâ facie* to be intended a benefit to the legatee. Now if the money due by the plaintiff to his brother the teſtator were to be ſet off againſt the annuity, the plaintiff would take no benefit. Beſides where there is an annuity deviſed, it is not ſo proper to allow a ſet off againſt it, as if it were a ſum in groſs.

Per Cur. Annuity decreed a charge upon the lands and an account to be taken of the arrears. The croſs bill diſmiſſed.

Lord

1787.

Friday, 22d June.

Lord Glerawley *againſt* Magee.

Verdict for defendant in an action for a libel may be ſet aſide, if contrary to evidence.

Lord GLERAWLY againſt MAGEE, Editor of *The Dublin Evening Poſt.*

ACTION on the caſe for publiſhing a libel, tried before *Crookſhanks*, J. laſt Spring Aſſizes at *Downpatrick*, when a verdict was found for the defendant. A rule had been obtained to ſet it aſide as contrary to evidence. The Judge not having certified his opinion of the verdict, his report of the evidence was ſent back to him for that purpoſe; whereupon he certified, that he thought it contrary to evidence, and was diſſatisfied with it.

Mr. *Curran*, Mr. *Blackburne*, Mr. A. *Stewart*, and Mr. C. *Walker* to ſhew cauſe. This action being for a libel, is in the nature of a criminal proſecution, and is founded on a matter for which the defendant might have been indicted. In ſuch caſes new trials have uniformly been refuſed when the verdict was for the defendant, though againſt evidence. 2 *Bur.* 664. 2 *Stra.* 1238. 3 *Wils.* 59. *Cowp.* 37. *Salk.* 646.

Mr. Attorney General, Mr. *Caldbeck*, and Mr. *Dunne*, *contra*. The principle upon which actions of this nature are ſupported, is, that every perſon is intitled to a civil retribution for a civil injury. If that be law, and this verdict be againſt evidence, the court will not be prevented from ſetting it aſide, becauſe a criminal proſecution would lie againſt the defendant. 3 *Wilſ.* 59. and 2 *Stra.* 1238. were actions for a penalty, and no particular injury had been done to any one. *Cowp.* 37. was for a malicious proſecution for forgery, which is in

in its nature an hard action; for it is a principle of policy that all persons shall be encouraged to carry on public prosecutions; whereas traducing the character of another, a peer of the realm, and that too in so public a manner as by a newspaper, cannot be too severely checked and punished. The case in 2 *Bur.* 664. does not warrant the principle for which it was cited. The ground of refusing a new trial there, was that the judge had reported that the damages which the plaintiff had sustained were not more than half-a-crown. In order to have an opportunity of recovering that, the plaintiff would have been obliged to pay the costs of the former trial. It is said that this action favours of a criminal prosecution, and therefore the verdict being for the defendant, though manifestly against evidence, ought not to be set aside. Actions for assault and battery are of that nature, and there is a fine to the King; yet it never was laid down, or pretended, that in such actions a verdict for the defendant against evidence could not be set aside. In **Crawley* v. *Archdall* in this Court this term, an amendment was allowed to support a verdict for the plaintiff in such an action, by which the defendant was prevented from taking advantage of an error which would have been fatal.

1787.

Lord Glerawly *against* Magee.

Yelverton, Chief Baron. This is an action for a libel. The jury have found for the defendant; the judge has reported that he thinks the verdict contrary to evidence, and we are of the same opinion from what appears from

* Ante, p. 203.

the

1787.

Lord Glerawly *against* Magee.

the report. The verdict therefore must be set aside, unless this general rule be established, that in all cases where the action sounds in criminality, no verdict for the defendant, however contrary to evidence can be disturbed; such a rule there certainly is not. There are indeed to be found several loose *dicta* of that complexion, for I can say no more of what Lord *Mansfield* says in the case in *Burrow*.—He says, that "this is a case where an indictment or information would lie, and in criminal cases where the defendant is acquitted, a new trial cannot be granted." That is undoubtedly true; but is that to establish a rule of law, that however contrary to evidence, a verdict for the defendant may be, if it be in an action for a matter for which an indictment or information would have lain, it cannot be set aside. Lord *Mansfield* throws in the observation merely as a secondary reason to the principal ground for refusing a new trial. There being then no such rule this verdict must be set aside.

Power, Baron. In trespass *vi et armis*, the charge is a breach of the peace, which is indictable; and yet it has never been pretended that in such cases where there is a verdict against evidence in favour of the defendant, the Court cannot use the indiscretion. No doubt there might be circumstances to induce the Court to refuse a new trial; but here the judge has reported that he was dissatisfied with the verdict, and we agree with him.

Hamilton and *Metge*, Barons, of the same opinion.

Per Cur. Rule made absolute.

Lessee

1787.

Same day. Baxter *against* Clements.

Leſſee of BAXTER *v.* CLEMENTS.

Before evidence of the loſs of a deed, evidence of the contents of it cannot be given.

EJECTMENT on the title before *Henn.* J. at the laſt Spring Aſſizes for *Cavan.* The Judge reported that the plaintiff proved that the premiſes in queſtion were the eſtate of the late *Nathaniel Clements*; and endeavoured to prove that they had been demiſed by him to the leſſor of the plaintiff's father *James Baxter*, in the year 1767, but not being in poſſeſſion of the leaſe, he produced the memorial, and the witneſs to the memorial, who ſwore that he had ſeen and atteſted an inſtrument which was called a leaſe of the lands, but had not read it; that he ſaw *Nathaniel Clements* ſign the memorial at the ſame time; it was ſtated that the leaſe itſelf had been loſt, and as evidence thereof, a man of the name of *Farren*, ſwore that *James Baxter* having failed in his circumſtances went abroad, and had previouſly lodged with him (the witneſs) a box of papers which he (*James Baxter*) told him were family papers; that the leſſor of the plaintiff returned home a ſhort time before the trial, and directed him to ſearch amongſt them for the leaſe, that he did ſo, but could not find it. But he could not ſwear that the leaſe was in the box when it was delivered to him. It was further proved that *James Baxter* had been in poſſeſſion of the lands from the year 1767, till he went abroad, which was about twelve years, and that the defendant had been in poſſeſſion ever ſince.—The Judge did not think this evidence ſufficient to entitle the plaintiff to read the memorial,

1787.

Baxter against Clements.

morial, as evidence of the contents of the leaſe. It was then offered as a ſubſtantive leaſe of itſelf, having been executed by the grantor, and as it recited the original leaſe, containing a complete demiſe. This alſo was rejected, and the plaintiff was nonſuited.—Motion was made to ſet aſide the nonſuit.

Mr. *Jameſon*, Mr. *J. Stewart*, Mr. *Corry*, and Mr. *Plunket*. It cannot be denied that under certain circumſtances, other evidence may be ſubſtituted in the place of a deed; the queſtion then is, whether this be ſuch a caſe as will admit of ſuch a ſubſtitute, and whether the evidence we have offered ought to be read as ſuch. It cannot he denied that we have given ſufficient evidence of the exiſtence of a leaſe, taking together the memorial, the evidence of the witneſs to the memorial, and the poſſeſſion of *James Baxter* for twelve years immediately ſucceeding the alledged date of the leaſe. 1 *Salk.* 286. the recital of a leaſe in the deed of releaſe, was, before the ſtatute, held to be evidence of the exiſtence of the leaſe, between the parties: and 1 *Lev.* 101. the order for adminiſtration was held to be evidence of the adminiſtration itſelf; and we contend that the plaintiff alſo gave evidence to go to the jury of the loſs of the leaſe.—Of a loſs of a deed none but circumſtantial evidence can ever be offered, unleſs it ſhould have happened that the very burning of it ſhould have been ſeen. Here the evidence of having ſearched unſucceſsfully for the leaſe among the family papers is evidence to the jury of a loſs. 1 *Salk.* 285. The Univerſity of *Oxford* entitled themſelves to a preſentation by a conviction of the Earl of *Shrewſbury* for recuſancy,

1787.
Baxter *againſt* Clements.

recuſancy, and upon giving *ſome* evidence that the record was loſt, inferior evidence was permitted to be given. 3 *Com. Dig.* 281. Lord Chief Baron *Comyns* ſays, that a counterpart has been allowed, where the original could not be found. There is at leaſt probable proof that there was an original leaſe of the lands in queſtion, and the memorial is at leaſt of equal force and authenticity with the counterpart of a leaſe. 1 *Mod.* 4. a copy not compared was allowed to be given as evidence. Should it be objected that the memorial is not a copy, it may be anſwered, that a copy is not the only evidence of the contents, the party may produce an abſtract, or even give parol evidence of the contents, *Bull. N. P.* 274. *Dub.* Ed. 1773. In *Wils.* 557. Drafts of a leaſe (which Lord Chief Juſtice *De Grey* ſaid were the ſlighteſt kind of evidence) were allowed to go to the jury, where there was no evidence of a leaſe having had exiſtence, no evidence of deſtruction, nothing but circumſtances. And in page 553 he ſaid, theſe ought to be read as a reaſonable preſumptive evidence, that there may have been ſuch a leaſe once exiſting, eſpecially as ſearch has been properly made and none can be found. If there were doubts whether the leaſe had been loſt or not, thoſe very doubts are a reaſon why it ought to be left to the jury.

But 2dly, In this caſe there was no occaſion to prove the exiſtence of a leaſe different from the memorial, and the loſs of it. The memorial itſelf is a ſubſtantive deed. It is a deed poll executed by the grantor, and contains a recital of the entire grant, which is con-

1787.

Baxter *againſt* Clements.

concluſive againſt all claiming under the grantor; as the defendant here muſt be taken to be. The memorial was made twenty years ago immediately after the execution of the leaſe, and formerly, it is well known, it was the cuſtom to recite the leaſes *in hac verba* in the memorial. At any rate, the deed being under ſeal, ought to have been read, 6 *Mod.* 45. 3 *Com. Dig.* 279. Any charter or deed under ſeal, ſhall be allowed for evidence. 3 *Lev.* 387. A deed enrolled by conſent of one party only, ſhall be evidence againſt him, and all who claim under him; here the regiſtry is equal to an enrolment.

The Attorney General *contra.* This memorial was firſt offered as evidence of the exiſtence of the leaſe, and then without giving any evidence of the loſs, it was offered as evidence of the contents; and the judge very properly refuſed it; but even if the plaintiff had proved the loſs; the memorial was not the proper evidence of the contents. The law of evidence as laid down by *Gilbert* is, that when the original deed is loſt, a copy may be had; but then there muſt be evidence that it had been compared. Here the witneſs ſwore that he never had even read the leaſe, and a memorial was never intended to be a copy; nor can the regiſtry be conſidered as an enrolment. There is no doubt where the law requires an enrolment to give effect to a deed, the inſpection of a deed is evidence; but the regiſtry is not neceſſary to give effect to the deed, but is merely intended as notice. And if ſecondary evidence could have been admitted, poſſeſſion muſt have gone along with the deed; but here the poſſeſſion for the

laſt

laſt twelve years has been againſt the ſuppoſed leaſe. 1787.

Baxter *againſt* Clements.

Next the memorial was offered as a ſubſtantive independent deed, under which the plaintiff ſought to make title, becauſe it contains a recital of the leaſe, and is therefore concluſive againſt the grantor, and all claiming under him. In the firſt place it does not appear, that the defendant claims under *Nathaniel Clements*, in fact he is not his heir at law, and in order to give that effect to a recital, it muſt be a recital in a deed; now a memorial is not a deed; it wants an eſſential property of a deed, namely delivery. Then it muſt operate by way of eſtoppel! This memorial cannot be an eſtoppel, for it is not an indenture.

Yelverton Ch. B. We are all of opinion, that this nonſuit ought not to be ſet aſide; there was not ſufficient evidence of the loſs, the memorial was not offered as evidence of the exiſtence of the deed, but as a ſubſtitute for it, which could not be admitted, 'till the loſs of the original had been proved. Now the only evidence of ſuch loſs was that *James Baxter*, on quitting the kingdom in diſtreſs, had delivered ſome papers to one *Farren*, who at the requeſt of the leſſor of the plaintiff ſome years afterwards, ſearched amongſt them for the leaſe, but could not find it. When weaker evidence than a deed itſelf is offered, two things muſt neceſſarily be proved; firſt, that ſuch a deed had exiſted. 2dly, that it has been loſt. As to the firſt, the memorial was not offered *eo intuitu*, and there was not ſufficient evidence of the latter.

Power

1787.

Baxter *againſt* Clements.

Power Baron. If the memorial had been offered as proof of the exiſtence of the deed, and refuſed, the nonſuit ought to be ſet aſide. But it was offered as a ſubſtitute for the deed, before plaintiff had laid a proper foundation for ſuch evidence. The miſtake was that the plaintiff thought that as the memorial was ſigned by the leſſor, it would itſelf operate as a leaſe; but he has not given the beſt evidence either of the exiſtence of the leaſe, or of the loſs of it. The only evidence of the loſs was *Farren*'s ſwearing that *James Baxter* had given him a trunk containing ſome papers, and that he had ſearched amongſt them, at the requeſt of the plaintiff, for the leaſe, but had not been able to find it. But there was no proof that all the papers of *James Baxter* had been handed over to the witneſs. If indeed he had ſworn that, it might have been ſufficient; but his deeds might have been handed over to another perſon; and that leaſe may at this day exiſt amongſt them. The beſt evidence the nature of the caſe would admit of, was not given.

Per Cur. Rule to ſet aſide nonſuit, diſcharged.

Same day. Wybrants *againſt* Tallon. Verdict for plaintiff in an action for uſe and occupation ſet aſide, for want of ſufficient evidence of a permiſſive enjoyment.

WYBRANTS againſt TALLON.

THIS was an action for the uſe and occupation of a ſtall in the Fiſh-market of *Ormond* market, in the city of *Dublin*, for eighteen months, tried before Lord Chief Baron *Yelverton*, at the ſittings after laſt *Hilary* term. There were two counts in the declaration;

ration; an *Indebitatus aſſumpſit*, and a *Quantum meruit*.

1787.

Wybrants *againſt* Tallon.

It appeared at the trial, that the ſoil whereon the market ſtood, was the eſtate in fee of the corporation of the city of *Dublin*, and had been ſo, time out of mind; that the city had demiſed it to a Mr. *Dawſon*, who demiſed to the plaintiff in 1783; that the plaintiff had conſtantly paid rent for it to *Dawſon*, and *Dawſon* to the city; that the occupiers of each of the ſtalls (excepting that occupied by defendant) conſtantly paid rent for them reſpectively at the rate of one ſhilling *per* week: and that in the leaſe to *Dawſon*, and in ſeveral previous leaſes theretofore made by the corporation, as alſo in that by *Dawſon* to the plaintiff, there was inſerted a covenant, that the occupier of each ſtall ſhould not be charged more than at that rate; that the defendant occupied one of the ſtalls, according to one witneſs, for eleven years, according to another, for ſeventeen; that the ſtalls had been frequently repaired, and for the laſt time about ſix years ago, at the expence of the corporation; but the witneſs (the carpenter employed) could not particularly ſwear that the defendant's ſtall had been repaired; but ſaid, that if it required repair at the time, it was repaired with the reſt; that gates had been erected ſome years ago, at each end of the Fiſh-market at the expence of the corporation; that theſe gates afforded a ſecurity to the whole market, and were regularly ſhut every night and opened every morning by the plaintiff; and that until they were opened the occupiers of the ſtalls, who made uſe of them only in the day time, had not acceſs to them.

1787.
Wybrants *againſt* Tallon.

There was no evidence of the defendant's having paid rent at any time for the occupation of his ſtall. But on his part it was proved, on the croſs examination of one of the plaintiff's witneſſes, and on the direct examination of one of his own, that the defendant had always refuſed to pay rent; that he paid for cleanſing about his own ſtall, but plaintiff paid for cleanſing the reſt of the market.—The time for which plaintiff declared in this action ran back ſix months into the time, for which he had got a verdict againſt the defendant in a former action; the recovery wherein however could not be then given in evidence, the record not having been made up in time. But this matter having been mentioned at the trial, it was conſented that the jury, in aſcertaining the damages, ſhould deduct the rent for thoſe ſix Months. Verdict for the plaintiff, with 2l. 12s. damages.

Upon a motion for a new trial, the Attorney General, Mr. *Curran*, Mr. *R. Johnſon*, and Mr. *Burrowes*, argued for the defendant. The Solicitor General, the Recorder, and Mr. *Scriven*, for the plaintiff.

On this day, Barons *Power* and *Metge* delivered their opinions for ſetting aſide the verdict. *Yelverton*, Ch. B. *Contra.*

Metge, Baron. This action for uſe and occupation is founded on contract, and unleſs there be evidence of an expreſs or of an implied contract, it cannot be maintained. Clearly there was no evidence in this caſe of an expreſs contract, and therefore it muſt depend on the evidence adduced to ſupport an implied one. It was objected that an implied contract would not ſuſtain this action; and the caſe of

Johnſton

1787.

Wybrants *againſt* Tallon.

Johnſton againſt *May*, 3 *Lev.* 150, was relied on, as an authority in point. But that caſe does not warrant the poſition. The *dictum* in the caſe muſt be taken *ſecundum ſubjectam materiam.* A *dictum* of a judge is of no authority but to a point before the court. The words of the court are, That in that caſe an expreſs promiſe ſhall be intended, and not a promiſe in law ariſing on the contract, which the whole court agreed would not lie, and that, if *non aſſumpſit* had been pleaded, an expreſs promiſe ought to be proved. But this, as I ſaid, muſt be underſtood *ſecundum ſubjectam materiam.* There an expreſs promiſe was laid; the plaintiff alſo declared on a *quantum meruit*, to which the defendant pleaded *non aſſumpſit*, and to the other count, he put in a demurrer. Upon that demurrer the court was bound to intend an expreſs promiſe, as laid in the declaration, and they did intend it; and they were very right in ſaying that the bare promiſe in law on the *quantum meruit* could not maintain the action *in ſuch caſe.* But be that as it may, the current of authorities down to the ſtatute 11 *Geo.* 2, proves that a promiſe in law will ſupport this action. But it cannot be doubted ſince the ſtatute, that an implied promiſe will ſupport the action; and indeed a caſe that has been very lately decided in *England*, and reported in the Term Reports 378, *Birch* againſt *Wright*, warrants that doctrine, if it be neceſſary to have a modern determination to ſupport it. The words of *Buller*, J. there are "The action for uſe and occupation is founded on contract; and unleſs there were a contract either expreſs or implied, the action could not be maintained." The next conſideration is, whether the plaintiff's being a purchaſer makes a diſtinction?

1787.

Wybrants *againſt* Tallon.

The defendant having held under the city, that is, having been in poſſeſſion when the city held the eſtate; it is clear, that if the city could have maintained this action, the plaintiff as a purchaſer could do ſo too; and beſides the caſes cited at the bar, the caſe of *Birch* and *Wright* which I have already cited, is directly in point. It was an action for uſe and occupation. Verdict for the plaintiff, ſubject to the opinion of the court upon a caſe which ſtated, that the defendant before the 18th July 1777, was tenant from year to year of the lands in queſtion to Mr. *Bowes*; that by indenture dated 18th July 1777, Mr. *Bowes* and Lady *Strathmore* granted annuities for her life, and covenanted to levy a fine to the uſe of the plaintiff, upon truſt to receive the rents and pay the annuities out of them; that a fine was levied accordingly; that defendant paid all rent due on the 22d *November* 1784, except 81l. 15s. to Mr. *Bowes*, but has not paid any rent ſince: that in *May* 1785, the plaintiff brought an ejectment againſt the defendant, and laid the demiſe on the 6th of *April* 1785, and in Trinity Term 1785 obtained judgment; that in *September* 1785, plaintiff gave notice to defendant of his title, and required him to attorn and pay him the money then in his hands; that the defendant refuſed to attorn, and thereupon a writ of poſſeſſion was executed, and the defendant quitted the premiſes; Lady *Strathmore* ſtill living. In that caſe, the plaintiff, who was grantee, recovered, down to the day of the demiſe laid in the declaration in ejectment. There Mr. Juſtice *Buller* well explains a caſe that had been urged with ſome ſtrength at the bar. It is the caſe mentioned in *Cowper* 246, where an ejectment was brought

1787.

Wybrants against Tallon.

brought for the premiſſes, and at the ſame aſſizes, the plaintiff recovered in an action for uſe and occupation. Says Mr. Juſtice *Buller*, alluding to it,—If the recovery in the action for uſe and occupation had been for the rent down to the time of the demiſe, the caſe is good law, otherwiſe not; for there muſt be a ſubſiſting contract to ſupport this action; and if there were a ſubſiſting contract, the plaintiff could not recover in the ejectment. The reaſoning there is concluſive, and reconciles that caſe, as it is reported; for *non conſtat* that the verdict was for rent, lower down than the time of the demiſe; and if ſo, the actions are reconcileable with each other. But the inference I draw from the reaſoning there, is, that there muſt be a relationſhip between the plaintiff and defendant to ſupport this action, a contract either expreſs or implied: and that leads me to the real queſtion in the preſent caſe. In that caſe which I have cited, there was clearly a tenancy under Mr. *Bowes* and Lady *Strathmore*. But in the preſent caſe the real queſtion is, whether there was that tenancy under the city, or whether the weight of evidence was not in favour of an adverſe holding by the defendant? There was no direct evidence of a demiſe by the city to the defendant; yet, there was evidence to go to a jury, that the defendant enjoyed by the permiſſion of the city. But there was not even the beſt kind of ſecondary evidence. There was no promiſe of payment of rent, nor any direct evidence of an aſſent, on the part of the defendant. But beſides the uncontradicted evidence of title—(For here there ariſes a diſtinction in this action for uſe and occupation. Where the purchaſer is the

1787.

Wybrants against Tallon.

the plaintiff, the title is proper evidence, *aliter non*, and ſo it is laid down by Lord *Mansfield*, in *Wolley* v. *Cloutman*, *Doug.* 234, which was cited by the Recorder; ſo in this caſe this evidence of title in my apprehenſion was neceſſary; for, ſuppoſing that there was no doubt of the relationſhip between the city and the defendant, how is the defendant to know that the plaintiff is entitled to the rent, unleſs there be evidence of the title? for though ſuch evidence is not neceſſary between the landlord and tenant, yet, it is ſo, where the vendee becomes the plaintiff) I ſay, beſides that uncontradicted evidence of title, there was evidence of acts of ownerſhip, ſuch as daily opening and ſhutting the gates and repairing the ſtalls. This was evidence to go to a jury of ownerſhip and permiſſion; and would be ſufficient, in my apprehenſion, to maintain the action, were it not controuled by evidence of a contrary tendency; that is, that the defendant had held for eighteen years without paying rent. The queſtion then is,—Was that evidence of an adverſe poſſeſſion? That depends upon *quo animo*, the rent was withheld, *i. e.* whether it was to be conſidered as evidence of a denial of the plaintiff's title, or of an unfair withholding of the rent, and that was ſurely a queſtion for the jury under the circumſtances of the caſe, where there were conſtant acts of ownerſhip, and where the defendant enjoyed the ſtall, and every day the gates were opened and ſhut by the plaintiff. Conſidering the evidence abſtractedly, without taking notice of the recovery by the plaintiff in a ſimilar action, (which has been mentioned) the inference is ſtrong in favour of an adverſe poſſeſſion: where no action

1787.
Wybrants *againſt* Tallon.

action had been brought for ſo long a time; and the more ſo, conſidering that payment of rent was always refuſed. That raiſes a ſtronger inference than that ariſing out of the acts of ownerſhip. I lament I have not judicial cogniſance of the former recovery. If I had, I ſhould not be for diſturbing this verdict. As it is, there is a ſtrong preponderance againſt the verdict; though I think the judge was right in letting the evidence, ſuch as it was, go to the jury, and in charging, that if they believed the defendant held under the plaintiff, *i. e.* by his permiſſion, they ſhould find for the plaintiff. In my apprehenſion, the evidence was ſtrongly the other way, and therefore I am of opinion that there ought to be a new trial.

I have authority from my brother *Hamilton* to ſtate his opinion to be, that the verdict ſhould be ſet aſide, notwithſtanding the ſmallneſs of the ſum found, as the caſe involves a queſtion of great and univerſal concern, and therefore ought to be decided in a more ſolemn manner; and is proper to be the ſubject of another trial, that it may be put on the record by a bill of exceptions.

Power, Baron. In this caſe two queſtions ariſe for the conſideration of the court.—1ſt. Whether the evidence on the part of the plaintiff was ſufficient in point of law, to ſupport an action for uſe and occupation. 2dly, Tho' the evidence were ſufficient and proper for the conſideration of the jury, whether, from the report of the judge, there ought not to be a new trial?

The firſt, is a mere legal queſtion, and I have pleaſure in reflecting that, as this verdict will now be ſet aſide, if on a new trial the

1787.

Wybrants *againſt* Tallon.

the ſame evidence ſhould be offered and the ſame charge given by the court, the point may be ſettled by a bill of exceptions.

At common law, where a demiſe was made by parol, deed or other writing, reſerving a certain rent, neither during the continuance, nor after the expiration of the leaſe, could the rent be recovered by action on the caſe. The rent followed the nature of the land, founded in the realty, and was recoverable, if on a contract for years or at will, by action of debt, and not by action on the caſe.—But as in every action of debt founded on a ſimple contract, the defendant might wage his law; various attempts were made, in the reign of Queen *Elizabeth*, and afterwards, to recover rent by action on the caſe, in which no wager of law was allowed.—The enjoyment of the defendant by the permiſſion of the plaintiff was the alleged conſideration to ſupport the promiſe; the promiſe was the giſt of the action. The attempt failed in the 33 *Eliz. Read* and *Johnſon*, *Cro. Eliz.* 242. and in 43 *Eliz. Clerk* and *Palady Cro. Eliz.* 859. it was held that *aſſumpſit* did not lie to recover rent on a demiſe by parol; debt being the proper remedy. Afterwards in the 9 *Car.* 1. 1 *Roll. Ab.* 8, *Potter* v *Fletcher*, it was held that an expreſs promiſe to pay rent in conſideration of the uſe and occupation, if alledged and proved, was ſufficient to ſupport an *aſſumpſit*, notwithſtanding an agreement tantamount to a leaſe ſhould appear in evidence at the trial — This determination was adhered to in *M.* 10 *Car. Action* v. *Symon*, *Cro. Car.* 414; in *Lance* v *Blackman*, *M.* 1655. *Styles* 463. and alſo in *Chapman*

1787.

Wybrants *againſt* Talton.

Chapman v *Southwicke* in the 19 *Car.* 2. 1 *Lev.* 204. 1 *Sid.* 323; in each of which caſes, it was agreed that there muſt be an expreſs promiſe proved to ſupport this action, the law raiſing none by implication. The expreſs promiſe was conſidered as matter collateral to the real contract and *quaſi* a *ſpecial* agreement to pay a ſtipulated ſum; to ſupport which, the leaſe, with the enjoyment, was held in law a ſufficient conſideration. It appears however, that in 35 *Car.* 2. *Johnſon* v *May*, 3 *Lev.* 150. the point was not conſidered as ſettled. But that caſe ſeems to have ſettled that an *indebitatus aſſumpſit* would lie for rent on an expreſs promiſe laid and proved, notwithſtanding a demiſe or agreement appeared on which debt would lie. But it was declared by the court that the law would in no *ſuch* caſe raiſe a promiſe by implication. The conſequence of this determination was, that if at the trial a demiſe by parol, or agreement in writing, reſerving a certain rent, appeared in evidence the plaintiff was nonſuited, unleſs an expreſs promiſe, made at the time of the demiſe, was proved. This obliged landlords, in all caſes, where the rent was aſcertained by agreement and no expreſs promiſe made to pay the rent, to reſort to the action of debt. But difficulties having occurred in recovering rent, where the demiſe was not by deed; by the 11 *G.* 2. c. 19. *Eng.* every landlord, where the agreement is not by deed, may bring an action on the caſe for the uſe and occupation, and give in evidence on the trial any parol demiſe or agreement, not by deed, whereon a *certain* rent was reſerved; which demiſe or agreement will be evidence of the *quantum* of the damages.—

This

1788.

Wybrants *againſt* Fallon.

This ſtatute is now of force in this kingdom by the 23 & 24 *G.* 3. c. 46. Thus are the difficulties obviated, which the landlord lay under in recovering rents reſerved on demiſes *not* by deed. Such demiſes will now ſupport an action for uſe and occupation without proof of an expreſs promiſe. But if an agreement by deed appear in evidence; to ſupport an *aſſumpſit*, it is neceſſary at this day to prove ſuch an expreſs promiſe as I have already ſtated; otherwiſe the landlord muſt reſort to debt or covenant, according to the nature of the deed. But tho' it was neceſſary before the ſtatute to give in evidence an expreſs promiſe when a *certain* rent was reſerved in any demiſe or contract; yet, where no demiſe or contract reſerving a certain rent appeared, and the plaintiff at the inſtance of the defendant permitted the defendant to occupy and enjoy, it never was queſtioned that a *quantum meruit* would in ſuch caſe lie for the uſe and occupation; and to ſupport ſuch an action, an implied promiſe will no doubt be ſufficient. The reaſon is obvious. If the value is not aſcertained, debt would not lie; the law therefore implies a promiſe, in conſideration of the uſe and occupation, to pay as much as the premiſſes are worth. It is from not obſerving that difference between a demiſe reſerving a certain rent, and a permiſſive occupation, where no certain rent was reſerved, that any doubt could at this day ariſe on the preſent queſtion.

An expreſs or implied contract or promiſe, according to the circumſtances of the caſe, is the giſt of every action on the caſe for uſe and occupation; the permiſſive enjoyment, the conſideration to ſupport the promiſe.

Such

1787.
Wybrants *againſt* Tallon.

Such being the ground of the action; and in the pleadings in this caſe, the plaintiff having declared on a general *indebitatus aſſumpſit*, and on a *quantum meruit*, I ſhall now examine whether any and what legal evidence was adduced at the trial to ſupport the preſent action.

There is no parol demiſe or agreement in writing (not by deed) reſerving rent pretended; ſo that the ſtatute is out of the caſe. No expreſs promiſe to pay rent, was attempted to be proved. Not a tittle of evidence therefore to ſupport the firſt count. To ſupport the ſecond count, a permiſſive occupation and enjoyment, in order to raiſe a promiſe by implication of law, was neceſſary; and that permiſſive occupation and enjoyment muſt be intended or ſhould be proved. Now it is ſettled that the law will not intend or imply a permiſſive occupation where the holding is adverſe; where the defendant appears not to have been a rightful occupier—a rightful tenant to ſome one. Some act then tantamount to an expreſs or implied contract or permiſſive enjoyment muſt be proved. What was proved in the preſent caſe? That the corporation, whoſe eſtate the ground was, uſually repaired *all* the ſtalls in the market; that the plaintiff paid for cleaning the market, but not for cleaning the defendant's ſtall; that gates had been erected at each end of the market, which afforded ſecurity to all the ſtalls; and that the occupiers of all the other ſtalls pay 1s. *per* week for each ſtall. Now if the evidence *reſted here*, it would be ſome evidence to go to a jury, in ſupport of the 2d count. The plaintiff having proved a leaſe from the corporation to *Dawſon* and from

Dawſon

1787. Wybrants *againſt* Tallon.

Dawſon to him, he ſtood in their place (and ſo far only can evidence of the title in this action be admitted,) and he would have given ſome evidence of a permiſſive occupation, under ſome contract, proper for the conſideration of a jury. But that evidence like all preſumptive evidence muſt give way when the contrary is proved. It was here controuled by the ſubſequent evidence, that the defendant's poſſeſſion from 11 to 17 years was a tortious, adverſe poſſeſſion, "the defendant always conteſting" (to uſe the words of the witneſſes for the plaintiff as well as the defendant) "and refuſing to pay rent." In my opinion, he, who always refuſed to pay rent to the plaintiff and thoſe under whom he derived, muſt be conſidered as holding the poſſeſſion under colour or pretence of title in himſelf or a ſtranger; eſpecially where there is no evidence, that during ſuch a length of poſſeſſion he paid or promiſed to pay the plaintiff, or thoſe under whom he claimed, any rent whatſoever, (for I lay out of the caſe all that was ſaid, becauſe no legal evidence appeared, of a former recovery in a ſimilar action.) Taking all the evidence together, not a circumſtance appeared from whence it could be fairly inferred that the defendant obtained the poſſeſſion under the ſame title, or in right of thoſe from whom the plaintiff derived; or that he ever was rightful tenant to any one. This, I ſay, was evidence of a wrongful poſſeſſion, and not of a permiſſive occupation; evidence that the defendant did not hold by permiſſion of the plaintiff, or thoſe under whom he derived, inſtead of being evidence that he did. It was evidence of a tortious, adverſe holding and enjoyment, which

1787.
Wybrants against Tallon.

which can raiſe no obligation to pay the owner; for ownerſhip is not the ground of the implied promiſe; nor is ownerſhip in queſtion in ſuch an action as the preſent. If evidence of ownerſhip or title to the profits, could ſupport the preſent action, I agree that this verdict is well-founded. But the title of the plaintiff, otherwiſe than as I have already ſtated, is not material in this action. Though the plaintiff had no title, he might, under certain circumſtances, maintain this action on an expreſs or implied contract, and though he ſhould on the trial make out a title to the poſſeſſion ever ſo clearly, ſuch title in itſelf would raiſe no legal obligation on the defendant to pay for the uſe and occupation, in ſuch an action as the preſent. If the plaintiff in his declaration had alledged a title to the poſſeſſion in himſelf or thoſe under whom he derived, as the ſole ground of the implied contract, the defendant might have demurred to the declaration. The plaintiff therefore has failed in the proof of that occupation, which only can ſupport the preſent action, and which cannot be intended where a tortious adverſe poſſeſſion appears. If however it appeared doubtful at the trial whether the occupation were tortious and adverſe or not, it was proper to be left to the jury, but the Court ſhould then have made ſuch deductions as flowed neceſſarily from the evidence, and the law as well as the fact ſhould have been ſtated to the jury. If the evidence of a tortious adverſe poſſeſſion, had ariſen from the teſtimony of the defendant's witneſs only, I ſhould have left the fact to the jury with the legal obſervations I have mentioned; but as from the croſs-examination of the plaintiff's own

1787.

Wybrants *againſt* Tallon.

own witneſs, a tortious adverſe poſſeſſion appeared, the plaintiff ſhould in my opinion have been non-ſuited. It was ſaid during the courſe of the argument, that it was no matter, whether the poſſeſſion was adverſe or not: if the defendant enjoyed under the title of the plaintiff, that the law would imply a promiſe to pay. This aſſertion cannot in my opinion, be ſupported by any rule of law, right reaſon or ſound policy. Occupation by wrong can never ſupport an action for uſe and occupation, which is founded on contract expreſs or implied. Defendant cannot be a lawful tenant and a treſpaſſer at the ſame time; if a treſpaſſer, the plaintiff muſt make an actual entry or recover in ejectment to make the defendant liable to meſne profits in an action of treſpaſs. In all Diſſeiſins the profits follow the poſſeſſion, and he who is in poſſeſſion has the profits; re-entry therefore is neceſſary to reveſt the eſtate and the profits thereto belonging, before meſne profits can be recovered in an action of treſpaſs. But if it were once eſtabliſhed that occupation and enjoyment whether adverſe or not, will be ſufficient to raiſe a promiſe by implication of law, in an action for uſe an occupation, we ſhould overturn the known eſtabliſhed rule of law, that a perſon, who is out of poſſeſſion, muſt make an actual entry, or recover the poſſeſſion at law, before he can recover damages on account of the enjoyment. When a tortious adverſe poſſeſſion appears, and there is no evidence that the defendant was ever rightful tenant to any one, caſe for uſe and occupation cannot be ſupported on an implied promiſe, but the plaintiff muſt firſt recover in ejectment. In that action the defendant will be

1787.

Wybrants *againſt* Tallon,

be at liberty to controvert the plaintiff's title to the poſſeſſion, and prove, if he can, a title in another; which in the action for uſe and occupation he cannot do. It would be endleſs to point out the miſchiefs that would ariſe from allowing the preſent action to lie againſt a treſpaſſer or wrongful occupier, before a recovery in ejectment. After a recovery in ejectment, an action of treſpaſs for meſne profits may be maintained without proof of title. So for profits incurred *before* the demiſe laid in the ejectment, caſe for uſe and occupation will lie. The plaintiff may in *ſuch* caſe, wave the treſpaſs, and bring caſe for the uſe and occupation; but he could not ſupport this action for rent due *after* the demiſe laid in the ejectment, becauſe it would then appear he was a treſpaſſer from the time of the demiſe, and I have already ſhewn, that againſt a treſpaſſer or wrongful occupier, caſe for uſe and occupation cannot be ſupported.

My opinion therefore is, that, as from the evidence of the plaintiff's as well as the defendant's witneſſes, the poſſeſſion of the defendant appeared to be a tortious and adverſe poſſeſſion, the plaintiff did not at the trial ſupport the action for uſe and occupation; and that, if the evidence of the adverſe poſſeſſion had been ſuch as ought to have been ſubmitted by the court to the jury, the law as well as the fact ſhould have been ſtated for their information. If the defendant were a rightful occupier, and not a treſpaſſer; if he enjoyed by the permiſſion of the plaintiff, or thoſe under whom the plaintiff claimed; the plaintiff was entitled to a verdict. But if, on the contrary, from the whole evidence it appeared that the poſſeſſion

of

1787.
Wybrants *againſt* Tallon.

of the defendant was a tortious and adverſe poſſeſſion, then the defendant, and not the plaintiff, was entitled to a verdict. In either caſe therefore the verdict ſhould be ſet aſide, and a new trial awarded.

Yelverton, Ch. B. In this caſe I have the misfortune to differ from my brethren, and as I hold it to be a laudable candour to acknowledge an error, when a man is convinced of his miſtake, ſo do I think it puſillanimous to give up his opinion, when he feels himſelf right. From the nature of this caſe, as it ſtrikes me, I will be bold to ſay, that the experience of the law will never furniſh an inſtance, where there is ſuch perſuaſive evidence of a permiſſive enjoyment. The action is brought for the uſe and occupation of a ſtall. There are two counts in the declaration, an *indebitatus aſſumpſit*, and a *quantum meruit*. The caſe made at the trial was, that the ground is the eſtate of the city of Dublin, and has been ſo time out of mind. That the city made a leaſe of it to one *Dawſon*, and *Dawſon* to the plaintiff. That the city and their tenants for the time being, are ſo tenacious of their poſſeſſion, that they do not indulge the occupiers of the ſtalls, to have the uſe of them, as with an uninterrupted enjoyment, but that they reſume their poſſeſſion every evening, and that the occupiers are obliged to come as ſupplicants in the morning, to beg the owner's permiſſion to reenter. For the evidence is, that the city erected gates to incloſe the market; that theſe gates were opened by the plaintiff, or by his order, every morning, and ſhut every night at a certain hour. So that there was not one *general* licence, but it was repeated from day to day.

1787.
Wybrants *againſt* Tallon.

day. Every time the ſun riſes, the licence is renewed. Every time the ſun ſets, the licence is withdrawn. The owner might have excluded every occupier from the enjoyment of his ſtall, at his pleaſure. But the evidence goes further; the ownerſhip of the very ſtalls was proved to be in the city, for they have been conſtantly repaired at the expence of the corporation; and further, that one ſhilling *per* week is now uſually paid for a ſtall, and that the city have always, when they made a leaſe of the ground, ſtipulated with their tenant, that no more ſhould be charged. It was proved that the defendant occupied one of theſe ſtalls, that he had a ſhew-board over it, with his name painted on it; but though he had occupied for eleven years, according to one witneſs, or ſeventeen, according to another, he always diſputed payment of rent. This is the ſum of the evidence. I ſhall now examine the two grounds on which the verdict is impeached. 1ſt. That there was no evidence of any agreement to pay any rent; and 2dly. That the uſe and occupation, ſuch as it was, was not *permiſſive* but *adverſe* to the rights of the city. As to the firſt, perhaps it would be enough to ſay, that, as the plaintiff did not go on the firſt count, there is no occaſion to agitate that queſtion; but as it has been much relied on, and as I think, the law has been much miſtaken, I ſhall take it up from the earlieſt period, and trace it down to the time of the ſtatute. I conceive that, at common law, the nature of this action was looſe and undefined; but it was the prevailing opinion, that if a man had agreed to make a leaſe for years rendering rent, he could not maintain an action for uſe

1787.
Wybrants *againſt* Tallon.

and occupation for the recovery of the rent, either during the leaſe or after it had expired, for that it ſavoured of the realty, and this action was perſonal; but it went further, namely that where the ſum demanded, appeared to be a rent reſerved, and not a ſum *in groſs* on a ſpecial and collateral conſideration, this action could not be maintained; a ſpecial collateral conſideration, independant of an agreement to pay a certain rent, was neceſſary. The reaſon why proceeding by an action on the caſe was preferred to debt, has been truly ſtated by my brother *Power*. In debt, wager of law was allowed, in an action on the caſe it was not. I had taken down all the caſes, that have been cited by my brother *Power*, and ſome more. The earlieſt is that in *Cro. Eliz.* 242, where the doctrine is laid down to be as I have ſtated it. The next is *Cro. Car.* 343, referred to in 3 *Lev.* 150. The next is in *Cro. Car.* 414, in 1 *Car.* 1. There it was held, that this action could not be maintained on an implied promiſe as ſays the book, "on a ſale of goods, &c." But this notion (unleſs it be underſtood thus, that this action could not be maintained on an implied promiſe, where there was an expreſs contract) is much too ſtrict. The laſt traces of it are to be found in that caſe of *Johnſton* againſt *May*, in *Levinz*. But that caſe if attentively conſidered, inſtead of being an authority that this action cannot be maintained on an implied promiſe, is an authority directly militating the other way. It is an action for uſe and occupation, and there were two counts in the declaration. The firſt an *indebitatus aſſumpſit*, the ſecond a *quantum meruit*. There was a demurrer put in to the firſt count, and to the

the ſecond the defendant pleaded *non aſſumpſit*, which plainly ſhews that the notion of the perſon who drew the plea was, that the action could be maintained on the implied promiſe, but not on the expreſs; for then, as I before ſaid, it ſavours of the realty, and the nature of the action ought not to be changed to trice the party out of his wager of law. It is ſaid in that caſe, that "the court muſt intend an expreſs promiſe;" moſt certainly, becauſe it came before the court upon a demurrer, therefore every thing was neceſſarily to be taken for true that was properly pleaded. If that caſe ſhould be taken further, it would contradict a deciſion in the very next reign. That caſe of *Johnſon* againſt *May*, was in the 35 *Car.* 2, the caſe I allude to, was in 1 *Jac.* 2. reported in 3 *Mod.* 73. *Maſon* againſt *Beldham*, and it is a direct determination in the point. The caſe is ſhortly this: The declaration was for uſe and occupation, on the ſingle count for a *quantum meruit*; there was a demurrer to the declaration, which demurrer was overruled; and it was expreſsly determined that the action for uſe and occupation was maintainable on a *quantum meruit*; and *Pollexfen* ſaid, "no reaſon can be given why a man ſhould not have ſuch an action for the rent of his land, as well as for his * *horſe* or his chamber".

1787.

Wybrants *againſt* Tallon.

Lord *Holt* took up this idea, and in the 13th of *W.* 3d. he determined that an *aſſumpſit* would lie for the value of a ſhop, without an expreſs promiſe (1 *Com. Dig.* action upon *aſſumpſit* C.) and this was never denied to be law: and what furhter corroborates it, is the precedent in *Clift's Entries*, cited by the Recorder, where

* Qu. houſe.

1787.

Wybrants *againſt* Fallon.

there is a declaration on the *quantum meruit* only. But if there were any doubt upon the ſubject, the ſtatute 11 *Geo.* 2, in *England*, from which our ſtatute 23 and 24 *Geo.* 3. *ch.* 46. §. 3. is copied, would put it out of controverſy. For the words are, "to obviate ſome difficulties, it ſhall be lawful for all *landlords*," (which word ſhews that who is landlord, is material in this action) "to recover," what? not rent: no, but "a reaſonable ſatisfaction for the lands held or occupied, in an action for the uſe and occupation; and if in evidence any parol demiſe or any agreement, not being by deed, whereon a certain rent was reſerved, ſhall appear, the plaintiff ſhall not therefore be nonſuited;" ſo that the ſtatute does in expreſs terms ſay, that before that time the law was well ſettled, that this action might be maintained on an implied, or on an expreſs promiſe, but that it could not be maintained on a general *indebitatus aſſumpſit*, where a ſpecial agreement appeared, by which a certain rent was reſerved, therefore ſays the ſtatute, be it enacted that this action may be maintained, even tho' an expreſs agreement by which a certain rent was reſerved ſhould appear.

It was obſerved by Mr. *Curran*, that the paſſage in *Buller's Niſi Prius*, concerning this ſtatute, was awkwardly expreſſed, for that he introduces the adverſative BUT, though there is nothing adverſative in the ſentence. But the meaning of the paſſage ſeems to be this, that at the common law this action could not be maintained on an implied promiſe, *where there was an expreſs contract, as a parol demiſe or any agreement, not being by deed,* BUT that by the ſtatute this law is altered. And the paſſage, if thus

1787.
Wybrants *againſt* Tallon.

thus underſtood, is perfectly conſiſtent, and will help to reconcile former determinations, which ſeem at firſt ſight to differ. In my opinion, there is no ground to ſay, that it is neceſſary *now*, any more than it was *before* the ſtatute, to prove an expreſs promiſe to pay a certain ſum, excepting where you declare on an *indebitatus aſſumpſit* only; but that this action ſtands on the ſame ground as all other perſonal actions, which have been extended by the liberality of modern times, to anſwer all caſes where the plaintiff entitles himſelf, by ſhewing that the defendant is under a moral, legal, or equitable obligation to pay him his demand. Theſe are the words of Lord *Mansfield*, in *Cowp.* 290, and that in a caſe where he is extending the action to a ſubject, to which it never had been before applied, namely to an action brought by a legatee againſt an executor, for the recovery of his legacy. If the jury thought that the defendant occupied the ſtall by the permiſſion of the city or their tenant, he was under a legal, moral and equitable obligation to pay a compenſation for ſuch occupation, and they were right in finding as they did.

Here it may be conſidered whether the right to recover was transferable or not, and my brethren agree with me that it was. If any perſon ſell an eſtate, and there be no new contract, no new privity, that caſe cited by my brother *Metge*, proves that without any new act, or any thing correſponding to attornment, the new comer has a right to recover the rent; and nothing would be a good defence in an action brought for it, but ſuch as would be ſo in an action to force the attornment,

1787.

Wybrants *againſt* Tallon.

ment, namely that he did not know of the ſale, and had paid his rent before to his leſſor. This naturally leads me to the ſecond ground of objection; that the occupation of the defendant was adverſe and not permiſſive. I have already ſaid a good deal on this head. I never ſaw, nor perhaps ever ſhall ſee a caſe, where it was ſo fully proved, that the poſſeſſion was held by the permiſſion of the plaintiff. The permiſſion of the plaintiff was renewed every day. There may be caſes where the permiſſion is renewed every year; but I believe there never was a caſe, excepting this, where the permiſſion ended every night, and was renewed every morning. Yet this, it is ſaid, is only preſumptive evidence of a permiſſive enjoyment. Where the defendant cannot go into his ſtall any day, without the conſent of the plaintiff, ſhall that be called *preſumptive* evidence? I ſay it is clear, ſtrong, perſuaſive, I had almoſt ſaid *concluſive* evidence, and the jury could not, in my opinion, heſitate to find a verdict, that the poſſeſſion was held by the permiſſion of the plaintiff. But the expreſſion of a witneſs on his croſs examination, that the defendant had refuſed payment, proves the poſſeſſion adverſe! But that evidence does not apply to the poſſeſſion, but to the payment of rent, and is no more, than what happens in every caſe, where an action of this kind is brought, for if there be no refuſal to pay, there will be no occaſion for the action. But it is ſaid there muſt be an *expreſs permiſſion*. What is a permiſſion? a mere paſſive ſuffering, if I may be allowed the expreſſion. It is not an act. It is a paſſive ſtate, where a man ſuffers ſomething to be done, which he could have prevented; but here there

was

1787.

Wybrants *againſt* Tallon.

was not merely that paſſive ſtate, but an act of dominion of the plaintiff repeated twice in every twenty-four hours. I do not deny, if there had been evidence of an adverſe poſſeſſion, that the charge to the jury ought to have been, as my brother *Power* has ſaid; but I ſhould perhaps have gone further; I believe I ſhould have non-ſuited the plaintiff. But I underſtand an adverſe poſſeſſion to be, where colour or pretence of title is ſet up in the defendant himſelf, or in any other perſon; that certainly ought not to be tried in this action, but the plaintiff ought to be driven to his ejectment. But in this caſe what would there have been to be tried in an ejectment? Is there any queſtion of title in the caſe? certainly not. It is the nakedeſt caſe of the kind I ever knew. It would be illuſory and nugatory to ſend it to be tried in an ejectment on the title, where there was obviouſly nothing to be tried. And though I agree, where there is an adverſe poſſeſſion, that the plaintiff could not maintain this action; yet the mere non-payment of rent, I do not think is evidence of ſuch adverſe poſſeſſion.

But further, this is an application to the diſcretion of the court, which ought not to be exerciſed in favour of a litigious ſpirit; and however my brethren may not chuſe to take notice of the former recovery, I cannot diveſt myſelf of the recollection of it; eſpecially where the defendant availed himſelf of it on this trial, by taking credit for the amount of the damages recovered in the former action.

N. B. On a ſecond trial, the record of the judgment in the former action, was given in evidence, *inter alia*, and the plaintiff had a verdict, which was acquieſced in, without further oppoſition.

Leſſee

1787.

Saturday 23 June. Leſſee of Domville *againſt* Towſon. Tenant at will is not intitled to notice to quit, before an ejectment be brought againſt him.

Leſſee of DOMVILLE againſt TOWSON.

THIS was an ejectment on the title, tried before the Chief Baron. At the ſolicitation of counſel he ſaved the queſtion, whether a tenant at will was entitled to ſix months notice to quit? The court held clearly that ſuch tenant was not entitled to any notice.

Mr. *O'Neil*, as *amicus curiæ* mentioned that he had heard the Lord Chancellor (Lord *Lifford*) ſay that the caſe of *Parker* leſſee of *Walker* v. *Conſtable*, 3 *Wils.* 25. was miſreported, and that the determination of the court there, was concerning a tenancy *from year to year* †.

† That this was the caſe there, appears from the caſe of *Gulliver* leſſee of *Taſker* v. *Burr*, which was cited by the court to ſupport their determination in 3 *Wils.* 25, whereas that caſe appears by *Blackſtone's* report of it (1 *Blacks.* 596) to have been of a tenancy from year to year.

Same day. Graham *againſt* Whittington & al'. The finding of damages ſet aſide, becauſe the jury, without further evidence had increaſed them in order to reimburſe plaintiff the coſts he was obliged to pay to another defendant for whom they found a verdict.

GRAHAM againſt WHITTINGTON, and others.

TRESPASS for an aſſault and falſe imprisonment. *Whittington* pleading the general iſſue; the other defendants ſuffered judgment to go againſt them by default. A writ of enquiry to aſſeſs the damages againſt them, was inſerted in the *Venire*, &c, to try the iſſue. Upon the trial no evidence was given againſt *Whittington*, ſo the jury found a verdict for him, and aſſeſſed damages againſt the others at 10*l.* When they had brought in their verdict,

dict, it was ſuggeſted on the part of *Whittington*, that they ought to have found coſts for him. Accordingly the jury retired again, gave him 6*d.* coſts, and increaſed the damages againſt the others to 30*l.*

1787. Graham *againſt* Whittington & al'.

Mr. *Caldbeck* moved to ſet aſide the aſſeſſment of damages. He obſerved that it was an attempt to make the other defendants pay the coſts, which the plaintiff would be obliged to pay to *Whittington*.

Mr. *A. Stewart contra*, argued that the damages were not outrageous, compared with the injury; that the jury, in actions for *torts*, were the only judges of the meaſure of damages. If the plaintiff were to pay *Whittington* his coſts, and get but 10*l.* damages, from the other defendants, he would loſe by the action. If the finding be ſet aſide, it muſt be upon payment of coſts, which would be an hardſhip on defendants themſelves, and the plaintiff, upon another trial, muſt recover ſome damages.

Yelverton Ch. B. There was no evidence given between the time of the jury's coming into court with their firſt finding, and that of their retiring a ſecond time. They might have added coſts for the defendant *Whittington* in the box. If theſe had not been mentioned, the finding of damages againſt the other defendants, would have been only for 10*l.* The jury ought not to have increaſed the damages without further evidence. The finding muſt be ſet aſide, that ſuch miſconduct of the jury may not be ſuffered to prevail.

Per Cur. The finding of damages ſet aſide.

ARMSTRONG

1787.

Tuesday 26th June.

Armstrong *against* Dillon.

Motion to change the *Venue* cannot be made on either of the two last days of term.

Armstrong against Dillon.

Mr. *Caldbeck* moved to change the *Venue*.

Per Cur. You are too late. This cannot be moved on either of the two last days of term; for there can only be a conditional rule; and the plaintiff may have cause against it.

Same

1787.

Same Term.

In the King's Bench.

King's Bench. The King *againſt* Read.

We have been favoured with the following note of the opinion delivered by Lord Earlsfort, *on Monday* 18 *June* 1787, *in the caſe of the* KING *v.* READ.

Lord *Earlsfort*, Chief Juſtice.

Where defendant ſubmits to an attachment, the proſecutor has not a right to inſiſt on exhibiting interrogatories to him. 2 *Bur.* 796. 4 *Bur.* 2105. *contra.*

THIS was a motion on behalf of *Read*, who ſubmits to an attachment made abſolute againſt him, but which, the court directed, ſhould not iſſue, and he prays to be diſcharged, throwing himſelf on the mercy of the court. It is oppoſed by the proſecutor, who inſiſts that he has a right to exhibit interrogatories to *Read*, in order to make him confeſs more than he admitted in his affidavit, manifeſtly for the purpoſe of increaſing his guilt, and of courſe of having his puniſhment alſo increaſed by the court. The motion to diſcharge *Read*, before he ſhall have anſwered interrogatories, was oppoſed upon a variety of objections; ſome of them involving general principles of law, and others ſtriking at the practice of the courts; and therefore the motion has ſtood over from laſt term, and has been fully ſpoken to on both ſides.—Before I go into the caſe, I would obſerve, that I am againſt making attachments more penal or more expenſive than they have hitherto proved. I am not for carrying the principle an *Iota* farther than I have found it in this court; and

1787.
The King *againſt* Read.

and the plain tendency of the proſecutor's oppoſition is to make the puniſhment and the expence much greater to the perſon attached. It is urged by the proſecutor's counſel, that it is the right of the proſecutor, in all caſes, to exhibit perſonal interrogatories.—The principle upon which this court has uniformly proceeded (and I will go back to the revolution, now 100 years) directly contradicts the aſſertion of any right in the proſecutor, and gives the right to the oppoſite party or the power of the court.—The very terms uſed in the proceedings prove this. The defendant comes in, for what? To purge his contempt! He has a right to have the complaint, ſtated in the affidavit of the proſecutor, ſimplified and ſet forth in ſpecific charges in the ſhape of queſtions directly; and if he can anſwer them clearly, he is diſcharged: but if he cannot, he is fined or impriſoned or both: or if the interrogatories are ſo framed as to make him criminate himſelf, he objects to anſwering them. *Strq.* 444. The King v. *Barber.* Now all this is calculated to give him an opportunity of acquitting himſelf, which is the very reverſe of what the proſecutor wiſhes; and if an additional proof were neceſſary, it would be, that defendant has a *right* to put a rule upon the proſecutor, and demand perſonal interrogatories from him. And the diſcharging the defendant upon his own oath is grounded upon this principle, that it is oath againſt oath, the King v. *Ackworth*, 8 *Mod.* 81. and for the purpoſe of diſcharging the defendant, his oath is taken as true. This practice is very antient in this court and every court in this hall; for all the ſuperior courts have a concurrent

1787.
The King against Read.

concurrent power of attaching for contempt, and their practice is uniform. They could not enforce their orders without it. But the court of King's Bench, from its general superintendency over the magiſtracy and the community as *cuſtos morum*, to preſerve the King's peace, and keep officers of juſtice within the bounds of their duty, extend this power over ſeveral claſſes of men which are the objects of, and which are within its peculiar juriſdiction. I have ordered the officer to make diligent ſearch into the precedents; and he certifies, that ſince the year 1690, he finds no inſtance of interrogatories exhibited on the motion of the proſecutor, but a multitude where they have been exhibited at the inſtance of the defendant. In —— the King v. *Kubbage*; *Kubbage* was a county of *Down* juſtice, and attached upon his affidavit. That caſe was argued before the lords upon a complaint made there; and the attachment and mode of attaching approved of by their vote. A note of that caſe I had from J. *Robinſon*, who was a Judge of this court from the year 1757, thirty years. In 1769 the King v. *Parker*; in 1774, King v. *Muſgrave*; King v. *Blunt*; all the defendants were attached upon affidavit only. In 1776, occurred the caſe of the King v. *Mauclerk* in this court, directly in point. (*vide infra.* 299) But it is ſaid, the attachment is only to bring the party into court. Anſwer; it is alſo to exculpate himſelf by affidavit, or interrogatories if he chuſe. This was *Robinſon* J's opinion in the King v. *Reily*. In the caſe of the King v. *Hoſkins*. *H.* 9 *G.* 2. *Hardw. caſes* 178. Lord *Hardwicke* attached *Hoſkins* upon his affidavit, and diſcharged *Line* the town clerk

1787.

The King *againſt* Read.

clerk on his affidavit. This contradicts the reaſoning in 4 *Burrow* 2106. where it is ſaid there is no charge againſt the defendant 'till interrogatories are filed. In *T.* 9 *Geo.* 2. King v. *Holland. Hardw. caſes* 150. Ld. *Hardwicke* attached the defendant upon his affidavit to ſhew cauſe; but (as in this caſe) the attachment was let to remain in the ſheriff's hands for a week, to give the party an opportunity of making atonement, if he choſe it. *Woodin* v. *Colledge. M.* 9 *Geo.* 2. *Hardw. caſes*, 167. S.P. It is objected that there is nothing to ground the judgment upon. Anſwer; in all caſes of actual contempt the foundation is the fame; the proceeding is ſummary. The courſe of the courts now in *England*, as ſtated by *Burrow*, leaves the court no pleading to pronounce ſentence upon. The officer ſettles the interrogatories and reports the party in contempt, and the court, by one of the judges, pronounces the judgment. If a perſon denies all on oath, he is of courſe diſcharged of the contempt; but if he have forſworn himſelf, he may be proſecuted for perjury. 12 *Mod.* King v. *Sims*. This ſhews that it is not the right of the proſecutor to exhibit interrogatories; for if it were, the defendant could not be diſcharged on his own affidavit. Now it would be abſurd, that in a caſe where the party confeſſes the contempt and ſubmits to the attachment, the proſecutor ſhould have a power of exhibiting interrogatories, and that when the defendant denies by affidavit, the proſecutor ſhould not: that is, where it can tend to prevent defendant from being diſcharged, the proſecutor ſhall not exhibit an interrogatory;

1787.

The King *againſt* Read.

rogatory; but where the defendant confeſſes the guilt, the proſecutor ſhall have a right to ſhew him more guilty. *Per Cur.* Attachment ordered to iſſue, in order to oblige defendant to appear in cuſtody to receive the ſentence of the court.——On *Tueſday* 19th *June*, *Read* came up for judgment. He was fined 5l. and diſcharged on paying proſecutor his coſts.

We have alſo been favoured with Lord ANNALY'S *Note of the King againſt* MAUCLERK. E. 1776.

The King *againſt* Mauclerk. Same point as in preceding caſe.

IN this caſe there was an attachment granted againſt the defendant, laſt term. In this term he appeared in cuſtody on the attachment, and petitioned the court to be diſcharged. He alſo made an affidavit that he had offered the proſecutor a reaſonable compenſation, who informed him that the proſecution had been carried on at the expence of another perſon (whom he did not name), and that he dare not ſettle it. Mr. Prime Serjeant and Attorney General moved at the ſame time, on the part of the proſecutor, for liberty to file perſonal interrogatories againſt the defendant, and cited *Bingley*'s caſe as an authority in point. But we unanimouſly refuſed the motion. We held that the defendant has a right, (where he does not ſubmit to the attachment, and in order to exculpate himſelf) when he appears in cuſtody, to put a rule on the proſecutor to file perſonal interogatories againſt him; but, that it could not and ought not be done on the part of the proſecutor. It was, in the firſt place

1787.

The King *against* Mauclerk.

place to no purpoſe. The defendant is attacked already, and ſubmits to it, and we can form a proper judgment what puniſhment to inflict on him, by the affidavits already made on the part of the proſecutor, which where they are not anſwered, muſt be preſumed true. Beſides, we very much doubted the power of the court to oblige a party to make an affidavit or anſwer interrogatories, that might criminate himſelf. If, on a rule to ſhew cauſe againſt an attachment, he does not anſwer them, the court will take the proſecutor's affidavit as true, and the fact admitted, but they will not (nor I think can by the rules of law) puniſh or impriſon him for not anſwering, for that might end in a perpetual impriſonment, and is a ſort of torture to oblige a man to criminate himſelf. As to *Bingley*'s caſe, we have no authentic account of it. When we have, we ſhall give it the conſideration it deſerves. We fined the defendant a ſmall ſum, and obliged him to pay the proſecutor reaſonable coſts; which we directed the officer to tax, and we gave the defendant the coſts of the motion, which we ordered the officer to tax, and to deduct out of the coſts to be paid to proſecutor.

Exchequer.

1787.

Exchequer.

After Trinity Term, 1787.

LEWIS against NIXON.

Monday 9th July. Lewis *against* Nixon. The court will not appoint a receiver of an undivided part; but will oblige security to be given to abide the decree.

MR. *Downes* moved to have a receiver appointed of the lands in the pleadings mentioned, as to one fifth part thereof.

Per Curiam. (*Yelverton* Ch. B. and *Metge* B.) We never grant a receiver as to a part of the rents. The Lord Chancellor refuses to appoint a receiver even of a moiety; tho' the right be unqueſtioned; and with good reaſon; for it would ſubject the tenant to great inconvenience by making him liable, at the ſame time, to the attachment of the court for one perſon, and to the diſtreſs of the others. But we may oblige the perſon againſt whom you apply, to give ſecurity to abide the decree.

CARR, Executor of DAVIS, againſt HENRY AYLMER and others.

Same day. Carr *against* Aylmer & al'. Upon the return of an attachment againſt an infant defendant, for want of appearance, the court will appoint a guardian to appear and anſwer.

BILL of foreclosure: Upon the return of the firſt proceſs, the defendant's father obtained an order to appear and anſwer, as guardian; and accordingly did appear; but refuſed to anſwer; whereupon proceſs had run to a ſerjeant arms.

Mr. *Sankey* now moved that the Chief Remembrancer or his deputy might be appointed guardian to the defendants, to appear and

1787.

Carr *againſt* Aylmer & al'.

anſwer the plaintiff's bill; and to ſet aſide the order appointing the father their guardian, and his appearance as ſuch.

Curia. The order and the former appearance, by the father, as guardian, having been ordered on the return of the firſt proceſs, muſt be ſet aſide; and the deputy Chief Remembrancer appointed to appear and anſwer for the infants. For this purpoſe, the proceſs need not have gone ſo far as it has done, for by the late rule of this court, upon the return of an *attachment* againſt an infant for want of an appearance, application is to be made to the court to appoint a guardian to appear.

ARCHDALL againſt MONTGOMERY.

Same day. Archdall *againſt* Montgomery. A perſon who has made a depoſit upon being declared the higheſt bidder at a ſale under a decree is outbid at a ſubſequent ſetting up to ſale, he is intitled to have his depoſit back immediately; but for his intereſt and coſts he muſt wait the completion of the ſale.

MR. Solicitor General moved in behalf of one *Noble*, who had made a depoſit upon being declared the higheſt bidder at a ſale under the decree in this cauſe, and has been outbid at a ſubſequent ſale; that he ſhould be paid his depoſit, with intereſt and his coſts, out of the ſubſequent depoſit.

Yelverton Ch. B. On ſuch an application three things are neceſſary. Firſt, the Accountant General's certificate of the depoſit by the perſon on whoſe behalf the application is made; 2dly, the officer's certificate of the outbidding; and 3dly, the order confirming the ſubſequent ſale, or the purchaſer's conſent.—The perſon who was firſt declared the higheſt bidder, muſt undoubtedly have his depoſit now

now paid back to him. But to avoid the inconvenience which might arise from paying him interest thereon and his costs, immediately, the payment of them must be postponed, and must abide the completion of the sale. For if they should be paid out of the subsequent deposit, and a good title could not be made out to him, who should be ultimately the highest bidder; there would be no fund to reimburse him, what had been paid for interest and costs, to those who made the prior deposits. The order therefore must be, That Mr. *Noble* be paid his deposit, without prejudice to a future application for the interest and costs, when the purchase shall have been completed*.

1787.
Archdall *against* Montgomery.

* *The Practice is the same in* Chancery.

Bodkin against Kealy.

Wednesday 11th July.
Bodkin *against* Kealy.

THIS was upon a possessory bill. The Prime Serjeant (*Fitzgerald*) shewed cause against an attachment against the defendant who had been served with an injunction to the party, on the 24th of *July* 1786, and had thereupon abated the obstruction complained of by the bill; but on *February* following the defendant renewed the obstruction and increased it; whereupon the conditional order for an attachment was obtained. The defendant had appeared and answered interrogatories, and in his affidavit upon shewing cause against the attachment, he admitted that he did abate the obstruction, conceiving himself bound

An injunction in a possessory cause is only to bring the defendant into court. He may disobey it, but then must answer interrogatories as under an attachment, and then the court decide upon the right; if against the defendant, he is in absolute contempt, and the court will not take off the attachment till he abate the nuisance.

1787. Bodkin. againſt Kealy.

bound by the injunction ſo to do; but finding afterwards that he was miſtaken, and that he need not have abated it during the ſuit, he renewed it. The Prime Serjeant contended that the injunction to the party is merely to bring him into court, and that it is no breach of it, for the party to act as he pleaſes pending the cauſe.

Mr. *Finucane* and Mr. *Geoghegan contra.* It is a known principle that *nil innovetur pendente lite*, and it is inſerted in the injunction itſelf; which is, not only, to abate the obſtruction, but *to ſurceaſe and not to moleſt the plaintiff pending the cauſe.*

Yelverton, Chief Baron. If the injunction were to have the effect contended for by the plaintiff; and the defendant were to be attached for not ſtopping, pending the cauſe; the injunction of itſelf would make an end of the cauſe, without ever bringing it to a hearing: there would be no occaſion to proceed further on a poſſeſſory bill. If indeed, there had been an order to ſtop in the mean time, it would be a different caſe. But an injunction to the party is only to bring him into court. It is in the room of a *ſubpœna* in other caſes. A poſſeſſory bill is a *feſtinum remedium.* The proceedings do not go on from term to term, as upon other bills; but from month to month. If the defendant obey the injunction, the cauſe is at an end; but he may, if he pleaſe, diſobey it, but then he muſt ſubmit to the attachment, and come in as under one, to anſwer interrogatories, and then the Court is to decide upon the right. If it be determined againſt the defendant, he is in abſolute contempt, and the attachment will not be

be taken off till he abates the nuſance. The laſt interrogatory is always——Were you not ſerved with the injunction, and why did you not obey it? To which the defendant, if he have a mind to conteſt the right, anſwers, "That he was ſerved with the injunction, but did not obey it, becauſe he thought he had right.

1787.

Bodkin *againſt* Kealy.

Metge, Baron. If the injunction were to be obeyed in the firſt inſtance, and the party were to be in contempt immediately on not obeying it, there would be no occaſion to make an order to ſtop in the mean time, as the injunction itſelf would in fact be ſo.

Per Cur. Cauſe allowed.

Same day,

Blizard, Cuſtodee, *againſt* Corry.

BLIZARD, Cuſtodee, againſt CORRY.

Liberty given to an *elegit* creditor to bring an ejectment notwithſtanding the *cuſtodiam*, the cuſtodee having purchaſed the defendant's intereſt.

MR. *Dunne* on behalf of an *elegit* creditor, moved for leave to bring an ejectment, notwithſtanding the *cuſtodiam* which was granted in 1783.

The judgment on which the *elegit* was founded, was obtained in 1782. The cuſtodee had ſince purchaſed the defendant's entire intereſt.

Yelverton, Chief Baron. So the *cuſtodiam* is merged.

Upon reading the affidavit of the ſervice of notice,

Motion granted.

SWEET

1787.

Same day, Sweet and ux. Cuſtodees, *againſt* Auſtin.

SWEET and MARTHA his Wife, *Cuſtodees*, againſt AUSTIN.

Though this Court have given leave to bring an ejectment for lands granted in *cuſtodiam*. The party cannot bring it in any Court but the Exchequer.

THE Attorney General to ſhew cauſe on behalf of an *elegit* creditor, why he ſhould not be attached for having brought an ejectment in *B. R.* notwithſtanding the *cuſtodiam*. The cauſe ſhewn was, that this Court had given leave to bring the ejectment. *Yelverton*, Ch. Ba. It is the conſtant rule of this Court, that it is a contempt to bring an ejectment in another Court, for lands granted in *cuſtodiam*; and there ſeems good reaſon for the rule. It may be compared to the caſe of an action brought by the aſſignee of a bail bond, which muſt be brought in the ſame court as the original action; that Court being preſumed more conuſant of the circumſtances, and more capable of exerting their diſcretion to do juſtice to both parties. So the Court of Exchequer muſt be better acquainted with the ſituation of the parties, and of the tenants of the lands granted in *cuſtodiam*, than any other Court, which being ignorant of the rules of this Court, might ſuffer the proceedings to be abuſed, to harraſs the party who is tenant to the crown, and under the peculiar protection of this Court.

Per Cur. Cauſe diſallowed.

DARQUIER,

1787.

DARQUIER, Custodee, against ENGLAND.

Same day, Darquier, Custodee, *against* England. Motion to set aside an attachment for irregularity; which had issued after notice of the motion. The party need not appear in custody.

MR. *Finucane* moved to set aside an attachment for irregularity. It was objected *contra*, that the person, on whose behalf he moved, did not appear in custody. The attachment had issued after notice of the motion to set it aside.

Per Cur. Where there is a motion to set aside an order for an attachment on account of irregularity, the party applying need not appear in custody, if the attachment issued after the service of notice to set it aside. If it had been for any other reason but irregularity, he must have appeared in custody on a motion to set it aside.

KING, Custodee, against DODD.

Same day, King, Custodee, *against* Dodd. Inquisition had, and custodee put into possession. To a bill to foreclose a mortgage made prior to the inquisition, the Attorney General must be a party; else a purchaser under a decree to sell, will be attached in the *custodiam* cause, for interfering with the rents.

MR. *Curran* shewed cause on behalf of one *Cox*, against an attachment for interfering with the rents. The inquisition was had the 12th of *February*, 1782, and the custodee was put into possession the 10th of *March* following. A bill to foreclose a mortgage of the lands made prior to the inquisition was filed the 13th *April* 1782, to which the Attorney General was not made a party. A sale was decreed. *Cox* became the purchaser, and was put into possession by an injunction.

Yelverton,

1787.
King *againſt* Dodd.

Yelverton, Chief Baron. Where after a bill has been filed, a party acquires a title to the lands, the plaintiff in equity is not obliged to make him a party to the ſuit, but the other muſt abide the fate of the cauſe. But if the title had been acquired before the filing of the bill, in order to affect him, he muſt be made a party. Therefore as in this caſe the inquiſition had been had before the filing of the bill, the Attorney General ought to have been a party.

Per Cur. Order for the attachment made abſolute.

Same day, Cahill, Cuſtodee, *againſt* M'Neale.

CAHILL, Cuſtodee, againſt M'NEALE.

If the order for the tenants to pay their rents be ſerved within a year after it was granted, it need not be revived, tho' the cuſtodee lie bye four years without applying for his rent.

MR. *Burſton*, on ſhewing cauſe why a tenant of the lands granted in *cuſtodiam*, ſhould not be attached for not paying his rent, purſuant to the order of this court, contended, that by the cuſtodee's lying by, without applying for his rent, from the 19th *November* 1782, when the order on the tenant was ſerved, till *December* 1786, there was a dereliction of the order on the tenants, and that it ought to have been revived.

Mr. Prime Serjeant *contra*, inſiſted that the order, having been ſerved in due time, within one year, while it was operative, attached the rents in the hands of the tenants as they ſhould grow due, and that there was no occaſion to revive it. The officer being applied to, reported the rule to be as laid down by the Prime Serjeant.

Per Cur. *This* cauſe diſallowed.

FOT-

1787.

Thurſday, 12th *July*. Fotteral, Cuſtodee, *againſt* O'Brien.

FOTTERAL, Adminiſtrator of MAHON, Cuſtodee *v.* Sir LUCIUS O'BRIEN.

A receiver cannot be appointed of lands granted in *cuſtodiam*. A mortgagee out of poſſeſſion may traverſe the inquiſition.

THE Prime Serjeant moved on behalf of a mortgagee out of poſſeſſion, to have a receiver appointed of the lands granted in *cuſtodium*, or for liberty to traverſe the inquiſition.

Power, Baron. This Court has no power to grant a receiver upon the King's tenant. It can only be done by conſent. It is contrary to the practice of this Court, and of the Court of *Exchequer* in *England*. But the mortgagee muſt have leave to traverſe the inquiſition; and then, upon the trial, the validity of the mortgage will come in queſtion.—The agent for the cuſtodee refuſing to conſent to the appointment of a receiver;

Per Cur. Let the mortgagee traverſe the inquiſition as to the lands comprized in the mortgage deeds.*

* From this determination, and many ſimilar ones *ſubſequent* to it, it ſeems to be now the ſettled practice of the Court of *Exchequer*, that a mortgagee, or aſſignee of a mortgagee, out of poſſeſſion, ſwearing that he is not in colluſion with the outlaw, is intitled to traverſe the inquiſition; contrary, we apprehend, to the former practice.

SEMPEL,

1787.

Same day, Sempel, Cuſtodee, *againſt* Prior.

Sempel, Cuſtodee, againſt Prior.

A cuſtodee may apply to the Court for liberty to bring an ejectment for non-payment of rent in the name of the outlaw, if he cannot procure the rent by any other means.

THE Prime Serjeant ſhewed cauſe on behalf of the executors of *Brett*, an annuitant, why the outlaw ſhould not have liberty to bring an ejectment for non-payment of rent. This, he ſaid, would be unexampled; the object of it was, not to ſecure the rents, as a motion to diſtrain would be; but to evict the tenants, who under the order of the court are paying their rent to the cuſtodee.

Mr. *Downes contra*. This motion is made with the conſent of the cuſtodee; for the tenants will not pay any one, and the outlaw himſelf is not at all concerned in it.

Power, Baron. Then you ought to have applied on behalf of the cuſtodee, that he might be at liberty to bring an ejectment in the name of the outlaw (who has the legal eſtate,) if the cuſtodee ſhould not be able to procure the rents in any other manner. This is the practice in *England*, in the caſe of receivers in chancery.

Per Cur. Cauſe allowed without coſts; with liberty to give notice on behalf of the cuſtodee to bring an ejectment in the name of the outlaw.

Tueſday, 17th *July*.

This day *Telverton*, Lord Chief Baron, delivered the opinion of the Court in *Newenham* and others, againſt *Devonſher* and others, *(vide poſt. p.* 320.*)*

ORMSBY

1787.

Same day, Ormsby *againſt* Nicholſon.

ORMSBY againſt NICHOLSON.

MR. *Downes* moved, that the receiver in this cauſe might be at liberty to give ſecurity before the next going judge of aſſize.

Yelverton, Chief Baron. The uſual courſe of the court is, that the ſecurity to be given, ſhould be aſcertained by a Baron; and then the recognizance is to be entered into before the Chief Baron. But where the receiver lives in the county, we have ſometimes permitted him to give ſecurity before a judge of aſſize. But then the amount of the ſecurity muſt not be left to the diſcretion of the judge, but muſt be meaſured by ~~a Baron.~~

The ſecurity to be given by a receiver muſt be meaſured by a Baron, and regularly ſhould be entered into before the Lord Chief Baron. If he lives in the country he may be permitted to give ſecurity before a judge of aſſize; but then it muſt be aſcertained by a Baron.

Wedneſday, 18th *July*.

SKERRET, Cuſtodee, againſt HAMILTON.

WARREN Cuſtodee, againſt the ſame.

Skerret, Cuſtodee, *againſt* Hamilton.

WARREN, the ſecond cuſtodee, had gotten an order for ſetting the lands in 1785, and received rents. *Skerret* did not get ſuch an order till 1786. Mr. *Emmet* moved on behalf of *Skerret*, to ſet aſide the order obtained by *Warren*, and that he ſhould be obliged to pay over the rents he had received, to *Skerret*.

If a ſecond cuſtodee procure an order for ſetting the lands while the firſt *cuſtodiam* is in force, it is a contempt; but if he ſhould have received any of the rents the Court will not, in the firſt inſtance, order him to pay them to the prior cuſtodee, but the prior cuſtodee muſt apply for an attachment againſt the ſubſequent cuſtodee.

Yelverton,

1787.

Skerret, Cuſtodee, *againſt* Hamilton.

Yelverton, Chief Baron. The order for ſetting obtained by *Warren* muſt be ſet aſide; (but without coſts,) for he cannot meddle with the rents while the firſt *cuſtodiam* is in force. He may proceed as he may be adviſed, to bring the prior cuſtodee to an account; and if he procured the order, knowing of the firſt *cuſtodiam*, it is a contempt. But this Court will not make an order, in the firſt inſtance, to oblige *Warren* to pay over the rents he has received. You muſt apply for an attachment againſt him.*

Per Cur. The order obtained by *Warren* ſet aſide, and no rule on the reſt of the motion.

* *Vide* ant. p. 124.

Same day, Cunningham, Cuſtodee, *againſt* Shearman.

CUNNINGHAM againſt SHEARMAN.

The affidavit ſhewing cauſe againſt an attachment, muſt be made by the perſon againſt whom it is ſought.

ON ſhewing cauſe why the tenants ſhould not be attached for not paying their rents purſuant to the order of the court, it appeared that the tenants themſelves had not made any affidavit; but the affidavit to ſhew cauſe was made by the outlaw.

Yelverton, Chief Baron. That is not ſufficient. The perſons applied againſt muſt anſwer. I remember a caſe before Lord *Tracton*, when I was at the bar, which I thought a very hard one. A conditional order for attachments, had been obtained againſt ten tenants. Seven or eight of them made very full affidavits on behalf

behalf of themſelves and the reſt of the tenants; but it was not allowed; and thoſe who had not made any affidavit were attached. This is very hard, I admit, where the cauſe to be ſhewn on behalf of each of them, turns upon one and the ſame point. But it is the rule of the Court.

1787.

Cunningham, Cuſtodee, *againſt* Shearman.

Per Cur. Cauſe diſallowed; but attachment not to iſſue till further order.

N. B. In a caſe that occurred the day following, it was held, that it was not ſufficient for the attorney of the party complained of, to make the affidavit, but it muſt be made by the party himſelf.

BAYLY, Cuſtodee, againſt CREAGH.

Same day, Bayly, Cuſtodee, *againſt* Creagh.

MR. *Duquery* on behalf of a tenant ſhewed for cauſe againſt an attachment for not paying his rent to the cuſtodee, that the whole of his rent had been paid to two prior *elegit* creditors, to whom he had attorned.

The affidavit of a tenant ſhewing for cauſe againſt an attachment for not paying his rent to the cuſtodee, that he had paid his rent to an *elegit* creditor, muſt ſpecify what lands he is tenant of, and aver, that he is not tenant of any other part.

Mr. *Emmet*, *contra*, objected that the tenant's affidavit ought to ſpecify what lands he is tenant of, and aver that he is not tenant of any other part; which the tenant had here omitted.

Per Cur. This is a fatal objection.

SWEET,

1787.
Thurſday. 19th *July.*
Sweet, Cuſtodee, *againſt* Auſtin.

Sweet, Cuſtodee, againſt Austin.

The death of the outlaw can only be pleaded by the terre-tenant.

THE Attorney General moved on behalf of one *Dawſon*, a third perſon, who did not appear to be terre-tenant or heir, to plead the death of the outlaw.

Mr. *Emmet* objected that this was the plea of the terre-tenant only, and the heir can only plead it as ſuch. *Bunb.* 102.

Per Cur. Motion refuſed with coſts, for it certainly is the plea of the terre-tenant only.

Same day, Hamilton, Cuſtodee, *againſt* O'Brien.

Hamilton, Cuſtodee, againſt Sir Lucius O'Brien.

Mortgagee having gotten liberty to traverſe the inquiſition, obtained leave to diſtrain or bring ejectments, on an affidavit that the tenants would not pay any one.

MR. *Attorney General*, on behalf of mortgagees, who had gotten leave to traverſe the inquiſition, moved for liberty to bring ejectments, or to diſtrain for the rents upon an affidavit that the tenants refuſed to pay.

Per Cur. Motion granted, on reading the affidavit of ſervice; there being no oppoſition.

Mansell,

1787.

Mansell, Custodee. *against* Ayre.

MANSELL, Custodee, against AYRE.

Inquisitions on an *elegit* and outlawry had on the same day. The title of the crown must be preferred.

MR. *Curran*, on behalf of a third person, moved for liberty to bring an ejectment on an *elegit*, on which the inquisition was stated to be prior to that upon the outlawry; but it appeared, that as to the lands in one county, the inquisitions were had on the same day.

Per Cur. As to these lands, the motion must be refused, for the title of the crown always takes place where it concurs with that of a subject.

Same day. Woods custodee *against* Lloyd.

WOODS, Custodee, against LLOYD.

If there be two custodiams a motion by second custodee for an order to set the lands, must be entitled as in both.

MR. *Finucane* upon shewing cause, on behalf of a third person, against an order for setting the lands, objected that it appeared from *Woods* own affidavit, whereon the order had been granted, that there was a prior *custodiam*, and an order for a receiver in both causes, yet the motion for the order was entitled only in the cause of *Woods* custodee against *Lloyd*. Whereas it ought to have been entitled as in both causes.

Mr. *Burston*, *contra*. It is no disadvantage to the prior Custodee to have the lands set. Besides,

1787.

Woods Cuſtodee, *againſt* Lloyd.

Beſides, it is ſworn, that the firſt Cuſtodee is in colluſion with the outlaw.

Yelverton, Ch. B. There is no doubt that the order for ſetting, ought to be intitled as in both cauſes, as the order for a receiver was. If any colluſion were apprehended, you might ſerve a rule to account, and when the prior Cuſtodee ſhall have been ſatisfied, you may proceed.

Same day. Ryan cuſtodee, *againſt* Lodge

RYAN, Cuſtodee, againſt LODGE.

Cauſe ſhewn againſt ſetting the lands, was, that defendant having been a trader, the outlawry was an act of bankruptcy, and veſted the property in the aſſignees. The court thought it an improper queſtion to be decided on motion, but gave leave to plead the bankruptcy to the inquiſition.

UPON ſhewing cauſe againſt ſetting lands, Mr. M. *Smith* contended that the defendant having been a trader, his ſuffering an outlawry was an act of bankruptcy, ſo as to prevent the title of the crown from interfering with the property in the aſſignees, in whom it veſted by relation, from the outlawry. It may perhaps be ſaid that the crown ſhall not be affected by the bankruptcy laws; but that only would apply to the caſe of an extent, or where the the prerogative is really exerted for the crown, and not where, as in the preſent caſe, it is merely lent to the ſubject. As, where a writ of *ne exeat regno* was granted to a ſubject, in the caſe of Mr. *Stannus*; the Chancellor held that an arreſt made under it, on a Sunday was illegal; but if it had been really at the ſuit of the crown, it would have been otherwiſe. The deſign of the legiſlature muſt have been to prevent any title ariſing to the crown for the benefit

benefit of a Cuſtodee in preference to all other creditors. 1787.

Ryan, cuſtodee, *againſt* Ledge.

Mr. Attorney General. This is not a proper queſtion to be decided in this manner, upon a motion. It concerns the prerogative, and can only be decided by interpleading with the crown. The court were of this opinion, and ſo Mr. *Smith* agreed.

Cauſe diſallowed without coſts—and leave given to plead the bankruptcy to the inquiſition, with the Attorney General's conſent.

Same day. Mahon cuſtodee, *againſt* Odlum.

MAHON, Cuſtodee, againſt ODLUM.

A tenant's intereſt granted in *Cuſtodiam* being evicted for non-payment of rent, the landlord having gotten the poſſeſſion, need not move to ſet aſide the *cuſtodiam*.

MR. *Milwood* moved on behalf of the inheritor of the lands to ſet aſide the *cuſtodiam*. The defendant's leaſe had ſince the granting in *cuſtodiam*, been evicted for non-payment of rent, under an ejectment brought by leave of the court.

Yelverton, Ch. B. Then you have recovered the poſſeſſion. There is no occaſion for this motion.

Per. Cur. No rule.

Same day. Ex parte Caſhel.

Ex parte CASHELL.

No motion can be made to plead to the eſtreat of a fine, or to diſcharge fines without giving notice to the Attorney General.

MR. *Saurin*, moving for liberty to plead to the eſtreat of a fine, was ſtopt, as no notice had been given to the Attorney General. Same objection to Mr. *Macartney's* moving on behalf of the Sheriff of the county of *Antrim* to diſcharge certain fines.

1787.

Same day. Darquier cuſtodee, *againſt* England.

DARQUIER, Cuſtodee, *againſt* ENGLAND.

A jointreſs can not diſtrain without the leave of the court, and therefore a tenant cannot excuſe himſelf from an attachment for not paying his rent to the cuſtodee, by an affidavit of payment to a jointreſs, without ſpecifying that it was made before the ſervice of the order.

MR. *Finucane*, on behalf of the tenant, ſhewed cauſe againſt an attachment for not paying his rent to the Cuſtodee. The firſt cauſe was, that the tenant had paid all his rent to the defendant's mother, who was a jointreſs under a ſettlement made long before the *cuſtodiam*; but the time of the payment was not ſpecified, ſo that it did not appear whether it had been made before or ſince the ſervice of the order on the tenants to pay their rents to the Cuſtodee. He ſaid it was immaterial whether the payment to her was before or after the ſervice, for a jointreſs is not obliged to apply to the court for liberty to diſtrain as annuitants, head-landlords, &c. are; and for this cited *Howard's Revenue*, 2 vol. 41.

Mr. Attorney General, *contra*—Denied the diſtinction, and ſo did the court, and the officer on being applied to.

Per. Cur. This cauſe diſallowed. But the land's having been covered by *elegit* creditors was allowed for cauſe.

JOHN

1787.

JOHN DEVONSHER, otherwiſe NEWENHAM, Eſq; an infant, by JOHN VEREKER, Eſq; his next friend; and EDWARD HOARE REEVES, Eſq; and MARY REEVES, otherwiſe DEVONSHER, his wife, executrix of ABRAHAM DEVONSHER; Plaintiffs. RICHARD DEVONSHER NEWENHAM, ELIZABETH RANDALL, otherwiſe DEVONSHER, widow, SAMUEL PENROSE and MARY his wife; WILLIAM PENROSE and MARGARET his wife; Defendants, in the original cauſe.

17th July.

Devonſher and others, *againſt* Newenham and others.

ELIZABETH RANDALL, otherwiſe DEVONSHER, widow; SAMUEL PENROSE and MARY his wife; WILLIAM PENROSE and MARGARET his wife; Plaintiffs.—The other parties in the original cauſe; Defendants in the croſs cauſe.

ABRAHAM DEVONSHER being ſeiſed in fee of a conſiderable eſtate in the county, and county of the city of *Cork*, and being entitled to the reverſion in fee, of lands then in the poſſeſſion of his brother *James Devonſher*, expectant on ſeveral limitations made by the will of their father *Jonas*, (and hereafter mentioned) on the 6th of *September* 1777, duly made and publiſhed his will as follows:— "The laſt will and teſtament of me, *Abraham Devonſher* of *Kilſhanick*, in the county of *Cork*, Eſq; Whereas I have by deed, dated on or about the 7th day of *December* laſt, charged the lands therein mentioned, with an annuity

In this caſe the court of Exchequer held that there were not words ſtrong enough, to exempt teſtator's perſonal property from payment of judgment and ſpecialty debts. But this decree was reverſed by the Lords, who decided alſo upon ſeveral other points in this caſe, *vide poſt.*

1788.

Devonſher and others, *againſt* Newenham and others.

or jointure of 200l. for my wife *Mary Devonſher*, purſuant to a power given me by my father's will, which charge was made only by way of precaution, and as part of the proviſion intended for her, in caſe my brother or myſelf ſhould leave male iſſue, which is not likely to happen; and it is my intention that my ſaid wife ſhall have 600l. a year, as and for her jointure (beſides what other things are hereby deviſed to her,) I do therefore charge and incumber *all my real eſtate, lands, tenements, and hereditaments*, with the following annuities, that is to ſay, one annuity or yearly rent charge of 600l. in caſe my ſaid wife ſhall chooſe to releaſe the ſaid recited charge or jointure of 200l. yearly: but if ſhe ſhall chooſe to retain it, then with one annuity or yearly rent charge of 400l. ſterling, to make up 600l. in the whole; ſuch annuity of 600l. or 400l. as the caſe ſhall happen, to be yearly iſſuing, ariſing, and payable to my ſaid wife and her aſſigns, during her natural life, (in lieu of her dower,) *out of all and every my lands, tenements and hereditaments*, and to be paid and payable to her by four quarterly payments, in every year during her natural life; the firſt quarter to commence on the day of my death. And I charge my ſaid eſtate with another annuity or yearly rent charge of 100l. to be paid and payable thereout quarterly, as aforeſaid, to my ſiſter *Elizabeth*, widow, during her natural life, in addition to what ſhe is already entitled to; and with another annuity or yearly rent charge of 60l. to be paid and payable thereout quarterly as aforeſaid, to my friend *Samuel Mitchel* during his natural life, unleſs his brother *Henry* ſhould die before him without male iſſue, in which caſe it

it is to ceaſe; and with another annuity or yearly rent charge of 30l. to be paid and payable thereout quarterly as aforeſaid to my ſteward *Thomas Cooke*, during his natural life; *with all which annuities or yearly rent charges, I do hereby charge and incumber all my real eſtate, and I give to my ſaid wife, and to the ſaid other annuitants reſpectively, full power and authority to enter into the ſame, and every part thereof, and to diſtrain for the ſaid annuities reſpectively*, and to ſell and diſpoſe of the diſtreſſes from time to time, for payment thereof, and all coſts, charges, and expences attending the recovery thereof, but ſo as that none of my tenants ſhall be diſtrained for more than the particular rent payable by each. And *ſubject to the ſaid annuities, and the remedy provided for recovering them*, I give and deviſe all my real and freehold eſtate to *Richard Townſhend*, and *Richard Longfield*, Eſquires, and their heirs, to the uſe of my brother *James Devonſher*, for and during the term of his natural life, provided he makes a leaſe of my houſe and demeſne lands of *Kilſhanick*, *Beneenagh*, *Lackabeby*, and part of *Holly-hill*, to my ſaid wife during her life, at the yearly rent of 100l. and from the time of his, my ſaid brother's refuſing to make ſuch leaſe, or from and after his death, which ever ſhall firſt happen, then to the uſe of my great nephew, *John Newenham*, third ſon of *John Newenham*, of *Maryborough*, Eſq; and the iſſue male of his body lawfully to be begotten, he the ſaid *John Newenham* the younger, and his iſſue male taking the ſirname and arms of *Devonſher*, without any other ſirname." (Teſtator then limits like remainders ſucceſſively to *Richard* the firſt, *Henry* the ſecond, and *Abraham*

1787.

Devonſher and others, *againſt* Newenham and others.

1787.

Devonſher and others, *againſt* Newenham and others.

Abraham the fourth ſon, of *John Newenham* the elder, every of them taking his name.) "*And I deviſe and bequeath to my ſaid wife* 1000*l. to be paid to her by my executors the day after my death; alſo my coach, horſes, and carriages of all ſorts, all her own and my wearing apparel and ornaments, and my linen, glaſs, and china-ware furniture.* And as to my other houſhold furniture and plate, I direct that my ſaid truſtees ſhall take an inventory thereof, and permit my ſaid wife to have the uſe of them for her life, and after her death, they ſhall go, with my manſion houſe of *Kilſhanick*, to ſuch perſon as ſhall be entitled to ſaid houſe, under this will." The teſtator bequeathed ſome ſmall pecuniary legacies to his ſervants; and provided, "And if the reſidue of my perſonal eſtate ſhould not be ſufficient to pay my debts and legacies, then I will and direct, that any part of my real eſtate in the city or liberties of *Cork*, or in *Muſkerry*, which my ſaid truſtees ſhall think proper, be ſold by them, and the purchaſe money paid to my executors for that purpoſe; and laſtly, I appoint my ſaid wife to be my ſole executrix and reſiduary legatee. In witneſs, &c.

In *July* 1781, *James Devonſher* died without iſſue, whereupon *Abraham* became ſeiſed in poſſeſſion of his lands, according to the will of their father *Jonas*, who had deviſed them to *James* for life;—remainder to his firſt and other ſons in tail male; remainder to *Abraham* for life; remainder to his firſt and other ſons in tail male; remainder to the heirs male of the body of himſelf (*Jonas*); remainder in tail, in contingency, to the daughters of *James*; like remainder to thoſe of *Abraham*; remainders in tail in common to teſtator's (*Jonas's*) own daughters,

daughters, viz. *Sarah Newenham* (grandmother of *Richard* and *John Newenham*, otherwiſe *Devonſher*, parties in this cauſe); *Margaret Randall*, (mother of *Mary* and *Margaret Penroſe*); and *Elizabeth Devonſher*, (now *Randall*, alſo party in this cauſe); remainder to teſtator's (*Jonas's*) right heirs. 1787. Devonſher and others, *againſt* Newenham and others.

On the 14th of *October* 1781, *Abraham Devonſher* made a codicil to his will, as follows, "Whereas ſince the making and publiſhing my will, my brother *James Devonſher* died: I do now by this codicil, which is to be taken as part thereof, give and deviſe to my wife *Mary Devonſher* and her aſſigns, during her widowhood, my manſion houſe and demeſne lands of *Kilſhanick*, and the other lands mentioned in my ſaid will, and now in my own hands and occupation. I alſo deviſe to her, during her widowhood, the lands of *Bally-gliſſane*, with power to make a leaſe or leaſes thereof for the term of 61 years, at a rent not leſs than 100l. yearly, and that part of the lands of *Beneenagh*, called the *Dairy*, on which I have lately built a houſe, with power to make a leaſe thereof for the term of 61 years, at a rent not leſs than 50l. yearly, all the ſaid lands to be enjoyed by my ſaid wife, during her widowhood, free from all incumbrances, except the chief rents payable thereout; *and I confirm to her the ſeveral deviſes and bequeſts made to her, or in her favour*, in my ſaid will; and I charge all my lands and tenements, except the above mentioned, with 1000 Guineas, to be raiſed thereout and paid to *Harriott*, the daughter of my nephew *John Newenham*; and with the ſum of 200l. to be raiſed thereout, and paid to *Robert Reeves* of *Cork*, or, in caſe of his death, to his daughters,

1787.

Devonsher and others, *against* Newenham and others.

daughters. I revoke the deviſes made in my ſaid will, in favour of the Rev. *R. Davies*, *Samuel Mitchel*, and *I. S.* I direct that the money due to me from *Savage French*, Eſq; and his brothers, or ſo much of it as ſhall be ſufficient, be applied to diſcharge the debts I contracted, as ſecurity for the ſaid *Richard Davies*. I further deviſe to my ſaid wife the lands of *Ballyready*, during her widowhood; and I direct and impower her to make a leaſe to Mr. *John Burke*, of his part thereof, for 99 years, at the preſent rent, inſtead of the term he now has. I alſo deviſe to her, during her widowhood, that part of *Beneenagh*, now in the tenancy of *Thomas Barry*, and the lands of *Ballyda*, in the tenancy of *I. D.* and *I. B.* and direct and impower her to make a leaſe thereof for 61 years, at the preſent rent, which I promiſed them, inſtead of their preſent term. *All which lands are to be free from all incumbrances; and I charge and incumber all my real and freehold eſtates, except the lands before named in this codicil, with all the debts I owe by bond, judgment, or other ſpecialty, and direct that my executrix ſhall pay my ſimple contract debts, and arrears of rent, out of my perſonal eſtate*; and laſtly, I confirm my ſaid will in all parts of it, not altered by this codicil. In witneſs, &c.

Abraham Devonſher being tenant for life of the lands come to him upon his brother's death, and being without iſſue male, and therefore having the next veſted remainder in tail which had deſcended to him, ſuffered a recovery of theſe lands in *Hilary* term 1781; and thereby became ſeiſed in fee, ſubject to the contingency of his having iſſue male.

On

1787.
Devonſher and others, *againſt* Newenham and others.

On the 20th of *April* 1783, he made a ſecond codicil to his will, as follows:—"I *Abraham Devonſher*, Eſq. make this ſecond codicil to my laſt will and teſtament. I deviſe the lands of *Shandangan* and *Farranſeſhary* to my niece *Mary Penroſe*, otherwiſe *Randall*, and to the heirs of her body; and I deviſe the lands of *Lahane*, as now tenanted by *G. D.* to my niece *Margaret Penroſe*, otherwiſe *Randall*, and the heirs of her body; and *I confirm all my deviſes and bequeſts mentioned in my will and codicil in favour of my wife Mary Devonſher*, otherwiſe *Mary Moore*. I deviſe to *Samuel Mitchell* one annuity or yearly rent charge of 50l. yearly, during the joint lives of him and his brother *Henry Mitchell*, to be iſſuing out of the lands of *Ballynafana* and *Glandelane*. In witneſs whereof, &c."

The lands deviſed in this codicil to the *Penroſes*, are part of thoſe of which the teſtator was ſeiſed at the time of his making his will.

On the 22d of *April* 1783, the teſtator *Abraham Devonſher* died, without iſſue; leaving the plaintiff *Mary*, his widow; and leaving the defendants, viz. *Elizabeth Randall* his ſiſter, *John Newenham* the elder, the ſon of his ſiſter *Sarah*, (which *John Newenham* died before the hearing of the cauſe, leaving *Richard Devonſher Newenham* his ſon and heir,) and *Mary* and *Margaret Penroſe*, daughters of his ſiſter *Margaret*, his heirs at law.

Upon the teſtator's death, the plaintiffs *John* and *Mary* became ſeiſed of the lands deviſed to them reſpectively, and ſhe having proved the will and codicils, poſſeſſed herſelf of the perſonal aſſets, (which in her anſwer to the croſs bill, ſhe admitted to be more than ſufficient

1787.

Devonſher and others *againſt* Newenham and others.

cient to pay *all the debts* and *legacies*) and paid the ſimple contract debts of the teſtator, and arrears of rent. The heirs at law claimed the lands included in the recovery, as having deſcended to them, which was admitted in the pleadings. The value of them did not appear in the cauſe, but counſel admitted that they were ſufficient to pay the teſtator's bond, judgment, and ſpecialty debts.

By the original bill it was prayed, that it might be deemed not only a bill on behalf of the plaintiffs, to aſcertain the order in which the teſtator's real eſtate ſhould be applied in diſcharge of his judgment and ſpecialty debts, but alſo on behalf of the judgment and other ſpecialty creditors, for an account of their debts; and to have them decreed a charge, in the firſt place, on the teſtator's undeviſed real eſtate, with payment or in default, a ſale of a competent part of ſuch eſtate, &c.

The croſs bill prayed to have the rights of the parties, under the will and codicils, declared, and an account taken of the real and perſonal eſtates of the teſtator, and alſo of his debts, and that payment thereof might be made out of ſuch fund as the court ſhall think proper; that *Mary* his widow, might make her election of the rent-charge under the deed and will, or of that by the will only; and that ſaid annuity might be paid out of ſuch part of the real eſtate as was ſubject thereto, or that it might be apportioned, and that the defendants (*inter alia*) might be injoined from diſtraining the lands deviſed to plaintiffs *Mary* and *Margaret Penroſe* reſpectively, &c.

In this cauſe theſe queſtions occurred. Firſt, Whether the perſonal aſſets of teſtator ſhould be

1787.

Devonſher and others *againſt* Newenham and others.

be exempt from the payment of his bond, judgment and other ſpecialty debts, or not? ſhould that be decided in the affirmative, then 2dly, Whether the deſcended lands, *i. e.* thoſe of which he had ſuffered a recovery, ſhould be applied to the payment of thoſe debts in exoneration of the deviſed lands? If not, then 3dly, Whether the lands deviſed in the ſecond codicil to the *Penroſes*, ſhould contribute with the other deviſed lands, to the payment of thoſe debts? A 4th queſtion was, whether *Mary* the widow, ſhould be injoined from reſorting to theſe lands deviſed to the *Penroſes*, for her annuity? This queſtion was overlooked in the arguing of this cauſe, and afterwards became the ſubject of a rehearing.

The cauſe came on to be argued on *Monday* the 29th of *January* 1787.—The Attorney General, the Solicitor General (*Carleton*, now Ch. Juſtice of C. B.) Mr. *Bennett*, (now Mr. Juſtice *Bennett*) and Mr. *Sankey* for the plaintiffs in the original bill.—Mr. *Wolfe* (now Solicitor General,) Mr. *O'Neil*, Mr. *Curran*, Mr. *M. Smith*, and Mr. *Paul* for the defendants, the *Penroſes*.

This caſe had been ſtated ſome time before, when we were not preſent, and then counſel for the plaintiffs offered to read the depoſitions of *Robert Reeves*, (who drew the firſt codicil, and received inſtructions for that purpoſe from the teſtator) to ſhew that the teſtator's intention was, and that he had ſo directed him to draw the codicil, that the perſonal eſtate ſhould be exempt from all debts, except rent due at his death, ſhop-debts, labourers accounts, and ſuch other ſmall debts, as would require immediate payment

1787.

Devenſher and others *againſt* Newenham and others.

ment out of his perſonal eſtate; and that his wife ſhould have the remainder to herſelf. The court would not allow theſe depoſitions to be read. For the admiſſion of them were cited 1 *Eq. Cas. ab.* 230, 231. 2 *Vern.* 648. 1 *Brown*, P. C. 305, S. C. 2 P. W. 136. 3 *Atk.* 77. 1 *Veſey* 456. Againſt it, *Talb.* 240. 4 *Brown*, P. C. 179. 2 *Atk.* 372. 5 *Co.* 68.

For the Plaintiffs; upon the firſt queſtion.— We do not deny that the perſonal property is the primary fund for the payment of all debts of a teſtator. That, we admit, is the general rule. But on the other hand we contend, that a teſtator may exempt the perſonalty from the payment of debts, and throw the burthen on that which is not the primary fund. He cannot, it is true, limit and reſtrain the remedy of creditors, or compel them to reſort to particular funds; but, as amongſt the objects of his bounty, he may marſhal his debts, and the ſeveral parts of his property, and appropriate them as he pleaſes. The principle of law with reſpect to wills, of real property, as well as of perſonal property, is *voluntas donatoris præcipue obſervetur*, if conſiſtent with the rules of law. So that, if it can be collected, in the preſent caſe, that it was the intention of the teſtator to give his wife his perſonal property, exempt from judgment and ſpecialty debts, the court is bound to give that intention effect. A teſtator may exempt his perſonalty from payment of debts, either by expreſs words, or by a plain intention, to make a ſpecific bequeſt thereof, appearing from the whole form and tenor of the will; *Walker* v. *Jackſon*, 1 *Wils.* 24. 2 *Atk.* 624. S. C. *Inchiquin* v. *O'Brien*, 1 *Wils.* 82. *Eq. Cas.*

1787.

Devonſher and others, *againſt* Newenham and others.

Cas. ab. 270. *in marg. Samwell* v. *Wake*, *Brown's Cha. Cas.* 144. *Stapleton* v. *Colville*, *Talb. Cas.* 202. Expreſs words are not neceſſary. In *Ancaſter* v. *Mayer*, *Brown's Cha. Cas.* 460. Lord *Thurlow* ſays, "It is indubitably true that expreſs words are not neceſſary to exempt the perſonal eſtate, the queſtion therefore is, whether a *preſumption* can be drawn of the teſtator's intention to exonerate the perſonal eſtate." This principle his lordſhip collected from the multitude of caſes on the ſubject. 1 *Lev.* 203, is the firſt to that purpoſe; ſince which there have been many caſes on this queſtion. In ſome of them the chancellor is made to ſay, that expreſs words are neceſſary to exempt the perſonalty. But ſee, what an abſurdity this involves! A teſtator's intention collected from little hints and looſe words in different parts of his will, is permitted to paſs real eſtates to ever ſo great a value; and ſhall he not be ſuffered, by ſimilar indications of his intention, to qualify and reſtrain his bounty to deviſees, in order to exempt the perſonal eſtate? In the caſe of an executor having a legacy left to him, he ſhall take the reſidue, as truſtee for the next of kin. This has been the rule ſince *Foſter* v. *Munt*, 1 *Vern.* 473. But if there is any thing to ſhew the teſtator's intention that he ſhould take the reſidue for his own benefit; he ſhall do ſo, *Bowker* v *Hunter*. *Browns Cha. Cas.* 328 In ſuch caſes courts have laboured ſo hard to penetrate the intention of the teſtator, that they have admitted parol evidence of it. In the preſent caſe we offered parol evidence of the intention, which was rejected, though at firſt ſight it ſhould ſeem equally admiſſible, as in that caſe. However, we contend that there is ſufficient evidence

1787.

Devonſher and others, *againſt* Newenham and others.

evidence on the face of the will and codicils, to ſhew that it was his intention to exempt the perſonalty from other than ſimple contract debts, and arrears of rent. He has ſhewn throughout an extreme anxiety to provide amply for his wife. She appears the conſtant object of his care, and he repeatedly confirms the bequeſts in her favour. The will begins with a jointure for her of 600l. *per annum*. He directs a leaſe to be made to her of the manſion houſe and demeſne at a low rent. He gives her an immediate legacy of 1000l. and after ſeveral other bequeſts to her, he leaves her executrix, and reſiduary legatee. As he advanced in years, his affection for her appears to have encreaſed. In his firſt codicil, the firſt thing he mentions, is the death of his brother, (by which his own property was conſiderably enlarged), and as if he had rejoiced in an opportunity of providing further for his wife, he deviſes to her the manſion houſe, with the demeſne lands, and ſeveral others, *free from all incumbrances*. He confirms the deviſes and bequeſts made to her in his will. Then comes the clauſe wherein he ſays, "*I charge and incumber all my real and freehold eſtates, except the lands before mentioned*, (i. e. thoſe given to his wife), *with all debts I owe by bond, judgment, or other ſpecialty, and I direct that my executrix ſhall pay my ſimple contract debts, and arrears of rent, out of my perſonal eſtate.*" By this clauſe he clearly marſhals his debts and aſſets, applying his real eſtate to the diſcharge of his ſpecialty debts, and the perſonal to that of the ſimple contract debts. This circumſtance diſtinguiſhes the preſent from all the caſes, which may be cited on the other ſide. Unleſs the clauſe is taken

ken in that ſenſe, it is altogether nugatory. The firſt part of it does not provide a new fund for the payment of ſpecialty creditors, which they had not before. They did not require ſuch a charge in their favour, being by law entitled to ſatisfaction out of the real eſtate. Nor could the teſtator mean it as a charge ancillary to his perſonal property, in caſe that ſhould be exhauſted in the payment of debts; for his perſonal eſtate was more than ſufficient to pay all the debts of every kind. This is not only confeſſed in the cauſe, but is the ground of the croſs bill; had he meant thereby to provide an ancillary fund, he would have made it liable to his debts generally, as he has done in his will. Theſe words muſt be conſtrued an application of his judgment and ſpecialty debts to his real eſtate excluſively, and a revocation of that part of his will which directs a particular part of his real eſtate to be ſold for the payment of his debts; ſuch part becoming inadequate, by the exemption of the perſonalty. Again, to what purpoſe is the direction to his executrix, to pay his ſimple contract debts, and arrears of rent, out of the perſonalty, if not to exclude other debts? By law it was liable to all debts generally, and ſo was it expreſsly by the will. If the teſtator intended that his wife ſhould pay all the debts, why did he only direct her to pay the ſimple contract debts? to which by law ſhe was liable without his direction. This part of the clauſe revokes that part of the will, which makes the perſonal eſtate liable to all the debts. Did the point reſt intirely on the will, there could be no doubt but that the perſonalty, even according to the teſtator's intention, ſhould be firſt applied

1787.

Devonſher and others, *againſt* Newenham and others.

1787.

Devonſher and others, *againſt* Newenham and others.

plied to the payment of all the debts; but the codicil applies it to debts of a particular kind, and expreſsly charges the reſt on the lands; and in *Walker* v. *Jackſon*, it was conſidered by the Lord Chancellor as a very ſtrong circumſtance, to ſhew that the teſtator intended to give the perſonal eſtate as a ſpecific bequeſt to his executors, that at a ſubſequent period of time he intended a further benefit to them, and made a variation from his will, by which the perſonal eſtate would have been applied in diſcharge of the real. Here the judgment and ſpecialty debts are expreſsly charged on the real eſtate; and in *Ameſbury* v. *Brown*, 1 *Veſey* 482, where a legacy was charged on a real eſtate, it was held that the perſonalty ſhould not be liable for it. Why ſhould not the ſame rule hold where certain debts are charged on the real eſtate? It is a rule of interpretation, that no words of a will ſhall be rejected, as inoperative, unleſs they are ſo dark and obſcure, that no conſtruction can be put upon them, or none that is conſiſtent with the reſt of the will. Here the words, "*free from all incumbrances*," applied to the lands deviſed to his wife, can have no operation unleſs the perſonalty be exempted. For it is admitted that that is amply ſufficient to pay all the debts; and if it be applied to theſe debts, none of the teſtator's lands can be incumbered, and therefore the exemption of her lands becomes nugatory. The teſtator ſhews great anxiety to exempt his wife from the payment of other debts, than thoſe which he particularly directs her to pay, and which from their nature ought to be immediately diſcharged out of the readieſt, that is, the perſonal fund With this view

1787.

Devonsher and others, *against* Newenham and others.

view it must be, that all the lands devised to her in the first codicil, he expressly exempts from all incumbrances, that is, judgment and specialty debts. How inconsistent then would it be, for him, at the same time to charge her with the payment of them, with respect to his personal property in her hands? Another circumstance shewing his intention not to subject her to specialty debts generally is, that he directs her to pay the arrears of rent; which are specialty debts. Upon the whole, as the testator here has abundantly signified his intention of exempting the personal property from his judgment and specialty debts, and has expressly allotted another fund for their payment, it is submitted that it ought to be held exonerated therefrom.

For the defendants; on the first question. The rules of a court of Equity, in the marshalling of assets, are of great consequence, and ought not to be deviated from, upon slight grounds; but ought to countervail any arguments of hardship to particular persons, whereas here, it is sought to break in upon them, in favour of a person otherwise amply provided for. Those rules have been established upon fœdal and upon modern principles. That the personal property shall be first resorted to, for payment of debts, is a rule that was first adopted in favour of the heir at law; then in favour of the *hæres factus*, or devisee of the whole; and lastly it has been extended to the devisee of a part. Express words, indeed, are not necessary to exempt the personal estate from the payment of debts; but it must appear to a demonstration, upon the circumstances of the case, that it was the intention of the testator to ex-

1787.

Devonsher and others, *against* Newenham and others.

empt it. The principle of construction in this point is the same as between an heir and devisee. Exempting the personalty is *pro tanto* a disherison of the heir, and the heir can be disinherited only by express words, or by necessary implication, that is, as it is defined by Lord *Vaughan*, such a kind of inference, that the contrary proposition to it would be absurd. In the case of the Duke of *Ancaster* v. *Mayer*, it is laid down that the personal estate ought never to be exempted but in two cases: 1st. Where there are express words used for that purpose: 2dly. Where the testator's intention to exempt it, though not in express words, is beyond the possibility of doubt. Lord *Thurlow's* words are, "If there be a *declaration plain or manifestation clear*, so that it is apparent upon the face of the will, that there is such a *plain* intention; the rule then is, not to disappoint, but to carry such intent into execution. But should not such intention *manifestly* appear, there is not a single case which does not take it for granted, that the personal estate is by law the first fund for the payment of debts." Here there is no such manifestation clear, that that was his intention. On the contrary it appears that he designed that to be the first fund. In his will he directs that, if his personal property be not sufficient for the payment of his debts and legacies, all or any part of his estates in *Corke* and *Muskerry*, should be sold, and the money paid to his executrix for that purpose. So that it appears he intended his personalty should be first applied, and that he was conscious of its deficiency. In the codicil, does he at all revoke the direction of his will in that respect? or, when by the will he had expressly

1787.

Devonſher and others, *againſt* Newenham and others,

ly made the perſonalty liable, can it be ſuppoſed that, having ſo conſiderably enlarged the wife's proviſion by the codicil, he had altered his intention with reſpect to the perſonal eſtate? By his will he gives her no part of the perſonalty, till the debts and legacies ſhould be paid, and then he intends for her but 600*l. per ann.* But when he gives her much more, namely ſeveral real eſtates, free from incumbrances, is it not the natural inference, that he did not mean to give her the perſonal, till ſhe had paid the debts and legacies? It is obſervable that neither by the will, nor either of the codicils, does he give her the perſonal eſtate expreſsly. She became entitled to it, only as executrix; and in that capacity, ſhe is by law liable to the payment of all the debts of every kind. At the time of making the firſt codicil, he appears to have conſidered, not only his perſonalty, inſufficient for the payment of his debts, but even the original auxiliary fund; and therefore he eventually charges the whole of his lands. That the charging of the real eſtate, with the payment of debts, will not exempt the perſonal, all the caſes agree. In *French and ux*, v. *Chicheſter*, 2 *Vern.* 568, the teſtator had by deed, conveyed certain lands to truſtees for payment of his debts, and by his will directed that his truſtees ſhould pay his debts, legacies, and funeral expences, out of his truſt eſtate; and expreſsly deviſed to his wife, whom he made his executrix, all his perſonal eſtate, intending thereby a proviſion for her, ſhe having been prevailed upon, to ſell part of her own inheritance. Notwithſtanding this, Lord Keeper *Wright*, and his ſucceſſor, held that, *the deviſe being in the ſame clauſe, in which ſhe was*

1787.

Devonſher and others, *againſt* Newenham and others.

named executrix, and not ſaid, free and exempt from payment of debts, ſhe muſt therefore take it as executrix, and the ſame muſt be applied to the payment of debts. *Talb. Cas.* 274, S. P. *Viner's ab. title charge*, E.--2 *Eq. ab.* 494. In 3 *Atk.* 202, Lord *Hardwicke*, ſays, "I know of no authority, where the words I make my real eſtate liable to pay my debts," will exempt the perſonal eſtate, *without any ſpecial exemption of the perſonal eſtate.*" 1 *Cha. Cas.* 297, is ſtrong to the ſame point. There the teſtator had conveyed lands to truſtees, to pay his debts and legacies, and after for performance of his will, which he made at the ſame time, and thereby directed the truſtees to pay certain legacies to three of his children, and the ſurplus to his heir. He made his wife executrix, and directed that thoſe three children ſhould *releaſe* to her, all ſuch actions and demands of his perſonal eſtate; but he did not give her in terms the perſonal eſtate; and therefore it was decreed, that the perſonal eſtate ſhould be applied in aid of the heir, not only with reſpect to the debts, but even the legacies charged on the truſt land, and notwithſtanding that the teſtator had directed the legatees to releaſe to the executrix. *Browns Cha. Cas.* 144, 1 *Wils.* 82, 2 *P. Wms.* 366. S. P. From all theſe authorities, therefore, it appears, that the firſt codicil by itſelf, does not exempt the perſonal eſtate; neither does the will; ſo far from it, it expreſsly directs it to be firſt applied. How then can the will and codicil taken together, exonerate the perſonal eſtate? The codicil confirms the will in all parts not altered by the codicil, but the will gives her only the *reſidue*, and the codicil does not alter that part. If he had intended her the whole perſonal eſtate, would he not have

1787.

Devonſher and others, *againſt* Newenham and others.

have ſaid ſo in expreſs terms? would he have left ſo important a bequeſt to the conſtruction of a vague clauſe in a codicil? As to the words which have been relied on, as marſhalling his debts and aſſets, they may be otherwiſe explained, in this manner. The teſtator thinking that his perſonal property would not be ſufficient to pay all his debts, or at leaſt could not be gotten in immediately to diſcharge them all, meant by theſe words to regulate in what order the debts ſhould be paid. It was ſaying no more than what every man ought to do. Let thoſe creditors, whoſe debts are a lien on the real eſtate, and carry intereſt, wait to be paid out of it, in caſe of a deficiency of the perſonal; or at leaſt, let them not be paid before my ſimple contract creditors, who may more immediately want payment. It is ſaid that his charging all his lands, was in order to exempt the perſonalty; whereas it implies, that he thought his perſonal property, together with the ſelect ancillary fund provided by his will, might be inſufficient to pay all his debts; but as he meant that his wife ſhould have the lands deviſed to her, unincumbered, he uſes words expreſsly charging his lands, (excepting thoſe) for the purpoſe merely of contra-diſtinguiſhing and exempting thoſe deviſed to his wife. Of his real eſtate, the lands in *Cork* and *Muſkerry* muſt be firſt reſorted to, to pay debts. This is the direction of the will, not altered, but confirmed, by the codicil. If ſo, then the perſonal property muſt be firſt applied, for thoſe lands are not to be ſold, till the perſonalty ſhall have proved deficient. If from the will and codicil taken together, you ſhould not think it clear and manifeſt beyond a doubt, that

1787.

Devonſher and others *againſt* Newenham and others.

that the perſonalty was intended by the teſtator to be exonerated, you are bound by the rule of equity to ſay that it muſt be firſt applied.

For the plaintiffs on the ſecond queſtion; namely, whether the deſcended eſtates ſhould be applied to the payment of debts in eaſe of the deviſed eſtates? That the real eſtate deſcended to the heir ſhall be applied to the payment of debts, in exoneration of lands deviſed, is a rule of equity fully determined by Lord *Hardwick*, after mature deliberation, in the caſe of *Galton* and *Handcock*, 2 *Atk.* 430. In that caſe the debt was, by mortgage, charged on the lands deviſed, yet the deſcended eſtate was decreed to be applied to the diſcharge of that debt. The ſtatute of fraudulent deviſes operates only in favour of creditors. It impowers them to reſort to the deviſed lands; whereas before, they could only reſort to thoſe in the ſeiſin of the heir; but it leaves the law, as between the heir and deviſee, as it was before the act. The rule of equity is in favour of the deviſee; and, therefore, in order to exonerate the heir at law, and throw the burden upon the deviſee, it muſt plainly appear that ſuch was the intention of the teſtator. As ſtrong a caſe muſt be made by the heir to exonerate him, as by the executor, to exempt the perſonalty. The deviſee comes not here for any ſtrained conſtruction, but to avail himſelf of the rule of equity in his favour. It is ſaid that here the teſtator has charged the lands deviſed with his judgment and ſpecialty debts, and that this circumſtance diſtinguiſhes this from the caſe of *Galton* and *Handcock*. But as between the heir and deviſee, the teſtator

1787.

Devonſher and others *againſt* Newenham and others.

tor has not charged the deviſed lands, or any part of them. The firſt codicil does not decide which real eſtate ſhall pay; it merely appropriates the perſonalty to the payment of ſimple contract debts, and his real eſtates generally to the diſcharge of his ſpecialty debts. Its object was to exempt the perſonalty from ſpecialty debts, and not to make the deviſed lands paſs to the deviſees, at all events *cum onere*, in favour of the heir at law. In *Powis* v. *Corbet*, 3 *Atk.* 556, there was a truſt term created by the teſtator for the payment of his debts, and ſubject to that term the lands were deviſed. There the deviſee could only take the remainder, and was not intitled to any benefit of it, till the uſes of the truſt term had been performed, and therefore could not call upon the heir at law to diſcharge the debts. But here there is no ſpecific eſtate charged. The teſtator charges all his real eſtate indifferently. Moreover, the reverſion in theſe very lands, which deſcended to him from his father, was comprehended in that fund. His words are "I charge all my real and freehold eſtate" and in his will, whereby he deviſes to *John Newenham*, he ſays, "I deviſe all my freehold and real eſtate". Theſe words were ſufficient to paſs the reverſion, and upon the falling in of the intervening eſtates, the land would paſs to the deviſee. *Cowp.* 363, 888. It is argued that the recovery was *pro tanto* a revocation, on the authority of *Martin* v. *Strachan*, 1 *Wils.* 2, 66, and that teſtator thereby acquired a new eſtate. Be it ſo. In that caſe, it deſcends, and by the rule of equity, the deviſee has a right to reſort to it to exonerate the lands deviſed. It is ſaid, that at the time he charged

1787.

Devonſher and others *againſt* Newenham and others.

charged his eſtates, he could not charge this, for then he had it not. To this it may be anſwered, that neither could he diſcharge it, for the ſame reaſon. They muſt ſhew ſome intent to that purpoſe ſubſequent to the recovery. But inſtead of ſuch intent appearing, the ſecond codicil ratifies and confirms all bequeſts and deviſes in favour of his wife. That confirms the charge of his ſpecialty debts on all his real eſtate, which he had made in favour of his wife, to exonerate the perſonalty and the eſtates deviſed to her. Taking it in this confined point of view, it is a ratification of the general charge on his real eſtate, and conſequently thoſe lands included in the recovery are thereby made ſubject to it. *Acherley* v. *Vernon*, *Com. Rep.* 383. Leſſee of *Pate* v. *Davis*, *Cowp.* 158. But this codicil is alſo to be conſidered a republication of the whole will *in toto*, and therefore, on the authority of thoſe caſes, this eſtate paſſes under the general deviſe in the will to *John Newenham*. It is objected that, upon the pleadings, it is admitted that theſe lands have deſcended. But the prayer of the croſs bill, to have the rights of the parties declared, leaves that point ſtill open. Throughout the whole will and the two codicils, taken together, there appears no trace of an intention in favour of his heirs at law. By his will, he had deviſed, not particular lands, but all his real and freehold eſtates to *James* for life, and then to his grand-nephew. After *James*'s death, in his firſt codicil, he confirms that diſpoſition of his will, and charges all his real and freehold eſtates with an exception, in favour of his wife, not of his heirs at law. This codicil was made in *October*,

October, and in *Michaelmas* term following he ſuffered the recovery, and can it be imagined that he thereby intended to releaſe that eſtate, in favour of his heirs, from the charges and diſpoſition thereof, which he had ſo lately made and confirmed. If he had not ſuffered the recovery, they would have taken the lands free from incumbrance, under the will of *Jonas Devonſher*.

1787.
Devonſher and others *againſt* Newenham and others.

For the Defendants. There can be no doubt of the general rule of equity, that deſcended eſtates are to be applied to exonerate thoſe deviſed. This has been ſettled in the caſe of *Galton* v. *Handcock*. There Lord *Hardwicke* conſidered the deviſee as the object of the teſtator's bounty, which, if the debt were to be paid out of the deviſed land, would be defeated, in favour of the heir, who was not in the conſideration of the teſtator. But that caſe is clearly diſtinguiſhable from the preſent. There the teſtator had by will deviſed a mortgaged eſtate to his wife, alſo a freehold intereſt, and made her ſole executrix. He afterwards purchaſed the inheritance, by which he not only revoked the deviſe of the freehold eſtate, but alſo diminiſhed the perſonal fund, which would have gone to the wife, to diſcharge the mortgage. It could not be the intention of the teſtator to throw the mortgage debt on her, under theſe circumſtances, in favour of the heir at law, who was not, at all, the object of his bounty, and had acquired part of his eſtate by mere accident. Beſides, in that caſe, the teſtator had not charged any part of his deviſed lands with the payment of his debts. Here the teſtator has.—In his will, he directs that his eſtates in *Corke* and

1787.

Devonſher and others *againſt* Newenham and others.

and *Muſkerry* (which were part of the deviſed lands) ſhould be ſold in caſe of a deficiency. In his firſt codicil, he confirms all parts of his will not therein revoked. His charging all his lands does not revoke that direction. It merely provides for the event of thoſe particular eſtates proving inſufficient. In *Powis* v. *Corbet*, 3 *Atk.* 556. it was held that deviſed lands charged with the payment of debts muſt be applied, before the deſcended eſtates can be reſorted to. There are other caſes, beſides that of *Galton* v. *Handcock*, where it was held that deſcended eſtates ſhould be applied before the lands deviſed; as *Chaplin* v. *Chaplin*, 3 *P. Wms.* 367. *Weſtfaling* v. *Weſtfaling*, 3 *Atk.* 467; but this expreſs charge of the debts on the deviſed lands, diſtinguiſhes the preſent from all other caſes. Here the lands are given to the deviſee, charged with the debts, and he muſt take them on thoſe terms. If the firſt point be given againſt us, as the circumſtances of teſtator's aſſets now are; or if the perſonal aſſets being firſt applied, ſhould prove deficient, the eſtates in *Cork* and *Muſkerry* muſt be firſt reſorted to; for the direction of the will is, that if the perſonalty be inſufficient, thoſe eſtates ſhould be ſold, and the produce applied to the payment of debts; and there is no difference in this reſpect, whether the deficiency ariſe in teſtator's life time, or by his diſpoſing of it by will. At the time the teſtator charged his real eſtates, by the firſt codicil, he was not ſeiſed of this eſtate, which has deſcended. As to the reverſion in fee, then in him, he could not charge that. A tenant in tail, with reverſion in fee expectant,

1787.

Devonſher and others *againſt* Newenham and others.

tant, cannot deviſe the reverſion, tho' he die without iſſue, 1 *Eq. ab.* 172. ſo neither could he charge it. But even admitting that he could, the charge being by will, was revoked by the recovery afterwards ſuffered. 3 *Lev.* 108. 3 *P. Wms.* 165. 3 *Wils.* 6. Any new modelling of the eſtate is a revocation, 3 *Atk.* 798. By the ſecond codicil he confirms his will, by which he had charged the debts on a particular real eſtate, and directed the truſtees to ſell them for that purpoſe. There is nothing in the ſecond codicil, impowering them to lay their hands on the deſcended eſtate. A ſhort time before he made this codicil, he became ſeiſed in fee of theſe lands, and muſt have known that they would deſcend to his heirs, and if he had intended to charge them, he would have declared ſo.

For the plaintiffs, upon the third queſtion, namely, whether the lands deviſed by the ſecond codicil to the PENROSES, *ought to contribute to the payment of judgment and ſpecialty debts?*— Theſe lands are parcel of thoſe deviſed by the will of teſtator, to *John Newenham*, and by the codicil they are, together with the reſt of the real eſtate of teſtator, charged with his judgment and ſpecialty debts. The ſecond codicil, which gives them to the *Penroſes*, makes merely a ſubſtitution of another deviſee, to take in the ſame manner as the general deviſee would have done, under the will and firſt codicil. It contains no expreſſion to exempt them from the charge which had been impoſed upon them. The ſame eſtate in them is given to the *Penroſes*, as is given in the other lands to *John Newenham*. This codicil confirms

1787.

Devonſher and others *againſt* Newenham and others.

confirms the charges in his will, and firſt codicil, made in favour of his wife, yet an exemption of theſe lands might eventually affect her; for then ſhould the other real eſtates be inſufficient, ſhe would be obliged to pay the deficiency out of the perſonal aſſets, which the teſtator has bequeathed to her, (for as the caſe is circumſtanced, we are here to ſuppoſe the firſt queſtion decided for us). And it appears that the teſtator intended that theſe lands ſpecifically deviſed ſhould remain ſubject to the charge; for after his deviſe of them to the *Penroſes*, leſt it might be thought a revocation of that charge as to theſe lands, he immediately ſubjoins, "I confirm all the charges and bequeſts made in my will and codicil in favour of my wife;" the principal of which was the charge of the judgment and ſpecialty debts on the whole real eſtate.

For the defendants. The queſtion here is, Where a man by his will has deviſed all his real eſtate to *A*. charged with his debts, and afterwards in a codicil, deviſes part of the lands to *B*. without ſaying any thing about his debts.—Whether the ſpecific deviſee takes them exonerated from or liable to a proportion of the debts? This is a mere abſtract queſtion. The codicil is, as to theſe lands, a revocation of the will, which gives all his real and freehold eſtates to *John*, and is a new deviſe of them to the *Penroſes*, and if they are to be charged, the charge would, for ſo much, controul and reſtrain this particular deviſe, ſo that the teſtator's deviſe of them would not be complied with. He gives all his real eſtates to *John*, ſubject to the annuities and debts; if this deviſe to the *Penroſes* had

had been a ſubſequent deviſe in the will itſelf, they would have taken free from the debts; and ſhall they be in a worſe ſituation becauſe the deviſe is made in a ſubſequent inſtrument? The deviſe to *John* is upon condition to pay the annuities and debts. The teſtator has revoked that deviſe as to part of the lands; and muſt this part nevertheleſs, ſtill remain ſubject to the condition?

1787. Devonſher and others *againſt* Newenham and others.

On *Tueſday*, 17th *July* 1787, *Yelverton*, Lord Chief Baron, delivered the opinion of the court on the firſt queſtion.

Yelverton Ch. B. In this caſe, ſeveral queſtions were made at the bar, which ariſe upon the conſtruction of the will of *Abraham Devonſher* deceaſed. But it being admitted on all hands, that the perſonal eſtate is more than ſufficient to pay all the debts and legacies, it will be unneceſſary for the court to give any opinion except only on the queſtion, whether the perſonal eſtate is exempted, or not, from the payment of the debts. There has been ſome difference of opinion in the court, but as we are now all agreed, I ſhall deliver what I may now call the opinion of the whole court.

It would be much more eaſy, in my apprehenſion, to ſay what it is, that ſhall not exempt the perſonal eſtate from the payment of debts, than to ſay what it is that ſhall. This is certain and ſettled, that charging the real eſtate in any manner, is not of itſelf an exemption of the perſonal property. Nay even giving a ſpecific bequeſt of the perſonal eſtate is not ſufficient to exempt it; and there are not wanting caſes where the real eſtate has been charged, and the perſonal given away ſpecifically

1787.

Devonſher and others *againſt* Newenham and others.

ſpecifically; yet the courts have determined that the perſonal eſtate ſhould not be exempted; ſo that if there be any general rule upon this point, it is, that the perſonalty is to be applied in the firſt inſtance, unleſs there be expreſs words, or a plain manifeſt intent to exempt it. But this general rule muſt be liable to great uncertainty, as long as it is undetermined what preciſe form of words is ſufficient to expreſs, what circumſtances are ſufficient, clearly to evince a manifeſt intent to exempt it. No preciſe form of words is neceſſary, and as to the circumſtances evincing ſuch intent, nothing is more ſettled than that the circumſtances muſt be collected from the will itſelf. That they muſt be ſo, was early determined in this caſe, by the whole court, upon an objection to the parol teſtimony of a witneſs who was examined to ſhew, that, however the teſtator expreſſes himſelf, it was his intent to leave the reſidue of his perſonal eſtate to his executrix, after payment of his ſimple contract debts, and arrears of rent only. That evidence the court rejected, and in rejecting it, did decide on the ſoundneſs of the rule, that the circumſtances evincing the intent muſt be collected out of the will itſelf, and that we could not travel out of it. That creating another fund, out of the real eſtate for the payment of debts, is not ſufficient to exempt the perſonal eſtate, may be proved from many authorities. There was a caſe indeed cited at the bar, from 1 *Ley.* 203. which was to ſhew that creating another fund, and appointing an executor, was ſufficient to diſcharge the perſonal eſtate. But that was only

1787.

Devonſher and others *againſt* Newenham and others.

only the argument of counſel, tho' indeed it was aſſented to by the court. But if ever that poſition was law, it has been exploded by numberleſs modern determinations. 2 *Vern.* 120. *Mead* againſt *Hyde*, is in the very point. The teſtator deviſed his real eſtate to the plaintiff, paying his debts and legacies, and if not paid within three months, that his creditors and legatees ſhould enter and hold till ſatisfied. To the defendant he gave 20*l.* and made him his executor. There there appeared a very ſtrong intention to charge the real eſtate with the payment of the debts, and the real eſtate only. Yet it was held that the perſonal eſtate was primarily liable. Neither is it enough that the executor, or any other perſon be left reſiduary legatee. In 1 *Wils.* 82. Lord *Hardwicke* ſays, "There is no caſe where it was ever pretended that the perſonal eſtate was exempted where the reſt and reſidue was given *after payment of debts and legacies*. But in *Samwell* v. *Wake*, *Browne's Chan. Caſes*, 144. tho' the reſidue was given expreſsly and without the words "after payment of debts and legacies," which is almoſt one of the ſtrongeſt caſes that can be to ſhew an intention to exempt the perſonal eſtate, and pay the debts out of the real; yet it was held that the perſonal eſtate was primarily liable. In *Wils.* 24. Lord *Hardwicke* ſays, *the reſt and reſidue of my perſonal eſtate* are the very worſt words that can be uſed to exonerate the perſonal eſtate:" and one of his predeceſſors, Lord *Talbot*, in *Bromhall* v. *Wilbraham*, (*Talbot's Caſes*, 274.) tho' the teſtator gave his perſonal eſtate expreſsly to his three ſiſters to be

1787.

Devonſher and others *againſt* Newenham and others.

be equally divided between them, and his real eſtate to his ſons, ſubject to his debts, held, notwithſtanding, that the perſonal eſtate was liable in the firſt inſtance. In *French* v. *Chicheſter*, 2 *Vern.* 568. the teſtator deviſed his eſtate to truſtees, and directed them to pay his debts out of it, and deviſed his perſonal eſtate, not before diſpoſed of, to his wife, as a proviſion for her, and in conſideration of her having been prevailed on to ſell part of her own inheritance. Tho' the bequeſt was given in lieu of her own inheritance, which ſhe had agreed to ſell in the life time of her huſband, to ſatisfy his neceſſities, which is ſtronger than any caſe I have cited, yet the perſonal eſtate was taken out of her hands, and applied to the payment of the huſband's debts. Neither does it ſeem to make any difference, in what way the real eſtate is charged, whether a term is carved out of the inheritance, or whether the inheritance is charged with the debts, and deſcends *cum onere*, or whether it is done by way of direction without any deviſe for the purpoſe; yet the real eſtate is not to be primarily applied; for Lord *Hardwicke*, 2 *Atk.* 624. ſays, "If a man deviſe his real eſtate by way of truſt, either to be ſold for a term of years, or the inheritance to be ſold, if he have done nothing to exempt the perſonal eſtate, it ſhall be primarily liable. The general rule," ſays his Lordſhip, "tho' delivered ſome times in one form, ſome times in another, is, that the perſonal eſtate ſhall be applied, unleſs there be expreſs words, or a plain manifeſt intention of the teſtator to exempt it, or to give it as a *ſpecific legacy*." This was held to be law by Lord *Hardwicke* in 1743. In 1744, hear

hear how his Lordſhip explains it. 1 *Wils.* 82, Theſe words are put into his mouth. "If the perſonal eſtate be exempted, it muſt be by expreſs words, or a plain intention ariſing from the whole tenor of the will, and it muſt appear that it is given away as a ſpecific bequeſt, and this muſt be taken along with it, that there is another fund raiſed for the payment of debts." So that, if this caſe be reported right, we find here what is neceſſary to exempt the perſonal eſtate. The perſonal eſtate muſt be exempted either by expreſs words, or by a manifeſt intention; and to evince that intention, it muſt appear that the teſtator has given it as a ſpecific bequeſt, and that he has provided another fund for the payment of his debts; and if either of theſe ingredients be wanting, the perſonal eſtate cannot be exempted. And ſays his Lordſhip further, "Whether a man by his will charges his real eſtate with the payment of debts, or directs it to be ſold for that purpoſe, there is no difference, and there are many caſes that prove it, and yet if the perſonal eſtate be not exempted expreſsly, or implicitly, viz. by deviſing it ſpecifically, it ſhall be applied in exonerating the real eſtate." This will be found to be the language of four ſucceſſive Chancellors, Lord *Talbot*, Lord *Hardwicke*, Lord *Northington* and the preſent Chancellor Lord *Thurlow*. They have all, uniformly, as appears by the caſes I have cited, held this language and maintained this doctrine. Now to apply that doctrine to the preſent caſe.

1787.

Devonſher and others *againſt* Newenham and others.

Abraham Devonſher, having a conſiderable perſonal, as well as real eſtate, on the 6th *September*, 1777, made his will, and by it

1787.

Devonſher and others, *againſt* Newenham and others.

made an ample land proviſion for his wife, and bequeathed beſides to her 1000*l.* to be paid to her the day after his death, alſo his coach, horſes, and carriages of all ſorts, all her own and his wearing apparel, and ornaments, and his linnen, glaſs, and china-ware-furniture; and as to his other houſehold furniture and plate, he directs his truſtees to take an inventory thereof, and to permit her to have the uſe of it for life, and after her death, to go (as a ſort of heir-loom) with his manſion houſe, to ſuch perſon as ſhall be entitled to it under his will. So that he gives her particular parts of his perſonal eſtate, and of thoſe particular parts, ſome abſolutely, and others with a qualified dominion; which of itſelf would be ſufficient to ſhew his intent, that ſhe ſhould take thoſe parts, and thoſe only, and ſhould not take the whole. But if there can be any doubt on this part of the will; at the cloſe of the will, that doubt is removed. There he ſays, "if the reſidue of my perſonal eſtate, ſhould not be ſufficient to pay my debts and legacies, then I will and direct, that any part of my real eſtate in the city and liberties of *Cork*, or in *Muſkerry*, which my truſtees ſhall think proper, be ſold, and the purchaſe money paid to my executor for that purpoſe." And laſtly he appoints his wife to be ſole executrix, and reſiduary legatee. Now I have already ſhewn that the word *reſidue*, is the worſt in the world to diſcharge the perſonal eſtate. But if the perſonalty be given at all, it is by operation of law, and not by expreſs words; for he has, almoſt in expreſs words, ſaid, "I give it to her as truſtee for the payment of my debts." Nay, ſo far was he from thinking that

1787.

Devonſher and others, *againſt* Newenham and others.

that his wife was to derive any benefit from it, that he creates an auxiliary fund for the payment of his debts. Thus, on the face of the will, and if he had gone no farther, (on the authorities I have cited, which ſpeak the language of four different Chancellors) there could be no doubt that the perſonal eſtate ſhould be primarily applied, not only in point of law, but as declared by the teſtator himſelf. But on the 14th *October*, the teſtator made a codicil, and by it, (his real eſtate having been encreaſed), he augmented the land proviſion for his wife, but does not give her a ſhilling, in expreſs words, out of the perſonalty; and he confirms the ſeveral deviſes and bequeſts he had made to her, or in favour of her, by his will. But no one will ſay, that by the will, any favour, as to the perſonal eſtate, was intended her, more than that ſhe ſhould take her chance of what ſhould remain, if any thing, out of it, after the payment of his debts. So, with reſpect to the perſonalty, the codicil goes no further than the will. Then, at the cloſe of the codicil, come theſe words, "I charge and incumber all my real and freehold eſtates, excepting the lands before named in this codicil, with all the debts I owe by bond, judgment, or other ſpecialty, and direct that my executrix ſhall pay my ſimple contract debts, and arrears of rent, out of my perſonal eſtate." Theſe are the only words that create any doubt. And even theſe go no farther than to evidence teſtator's intent to be to exempt his perſonal eſtate from certain debts by record, bond or other ſpecialty. Theſe words only cauſe a doubt. But if they do no more than create a doubt, they do not do enough to exonerate

1787.

Devonſher and others, *againſt* Newenham and others.

the perſonal eſtate. For to exempt it, a teſtator muſt uſe either expreſs words, or ſhew a manifeſt intention to be collected from the tenor of the will. But theſe words may bear another conſtruction, than to exempt the perſonalty in favour of his wife, which is the conſtruction contended for. The teſtator might have been apprized, that if he had been ſilent, and if the judgment and ſpecialty creditors had come on the perſonal property, and exhauſted that, (which was the natural fund for the payment of his *ſimple contract* debts;) then the ſimple contract creditors would have an equity to ſtand in their place, and to come upon the real eſtate. In order to prevent that, he might have held out this notice to the judgment creditors, not to come down on the perſonal eſtate; and to ſay to them, dont haſten to exhauſt the natural fund for the payment of my ſimple contract debts, of the ſufficiency of which, I am not ſatisfied, for you ſee it is my intent, you ſhould be particularly provided for, at all events, out of my real eſtate. It is poſſible, I ſay, that that might have been the intention of the teſtator in uſing theſe words. It is not contended for, that there are expreſs words to exempt the perſonalty. Is there then, a plain manifeſt intention? I ſay not, where another conſtruction is admiſſible; and if there be any doubt as to the intent, there is not enough; for there is not that plain and manifeſt intention, which the law requires. Suppoſe the teſtator had ſaid, "I charge my real eſtate with all my debts," and had gone no further than appointing his wife reſiduary legatee. That would not be ſufficient to exempt the perſonalty. Then, if charging his real eſtate with all his

his debts, and appointing his wife reſiduary legatee, would not be ſufficient to exonerate the perſonalty, why ſhould the charging his real eſtate with part of his debts, be ſufficient? But on the whole, it is enough to warrant and ſupport the opinion of the court, that there is room to doubt. If there be ſo, there can not be that plain and manifeſt intention which the law requires. That that is the opinion of my brother *Power*, who is abſent in another court, is plain from his words in a note to me, which I will read, "There were ſome circumſtances which inclined me to believe that it was the intention of the teſtator to exonerate his perſonal eſtate, " (thoſe muſt be the words I have mentioned out of the codicil), " but on conſideration, I think it is not ſufficiently plain and manifeſt; and unleſs it be ſo, on the face of the will, the perſonal eſtate is firſt to be applied;" So his doubts are ſufficient to ſupport the opinion of the court. Conſequently the decree muſt be.—That the perſonal eſtate is ſubject to, and not exempted from, the payment of the debts of the teſtator; and therefore it muſt be referred to the officer to take an account of his perſonal eſtate; into whoſe hands it has come, and how it has been applied; and alſo to take an account of his debts and legacies, and if any of the ſpecialty debts have been paid, to account out of what fund; (for this reaſon, that if any of the ſpecialty creditors ſhould have been paid out of the perſonalty, and that ſhould prove inſufficient, the ſimple-contract creditors may ſtand in their place); and all the creditors and legatees who are not parties to the ſuit, muſt be at liberty to come and prove their demands before the officer.

1787.

Devonſher and others, *againſt* Newenham and others.

The

1787.

Devonſher and others, *againſt* Newenham and others.

The queſtion,—whether the lands deviſed in the ſecond codicil to the *Penroſes*, ſhould be liable to the annuity deviſed to *Mary*, the widow of teſtator, (which aroſe upon the prayer of the croſs bill, that ſhe might be injoined from proceeding againſt thoſe lands for the recovery of it,) not having been diſtinguiſhed in the courſe of the argument from that,—Whether they ſhould be liable to the debts, the court omitted to deliver an opinion upon it. The cauſe, therefore, was re-heared, as to that point, on the 4th of *February*, 1788. But to avoid ſplitting the report of this caſe too much, an account of that re-hearing is here given.

The Solicitor General, (*Wolfe*) and Mr. *O'Neil*, argued for the deviſees in the ſecond codicil. The Attorney General, Mr. *Emmet*, and Mr. *Sankey*, for the principal deviſee, *John Newenham*.

Note. The widow in her anſwer to the croſs-bill, elected to take the entire annuity of 600*l.* under the will, and admitted that the eſtates deviſed to *John Newenham*, were upwards of 2000 *per ann.* *John Newenham*, admitted them to have been 1540 *per ann.* when he entered into poſſeſſion; and admitted the lands deviſed in the ſecond codicil, to be now only 160*l.* and 140*l.* *per ann.* but inſiſted that they were likely to riſe, in a few years, conſiderably in value.

For the particular deviſees. The queſtion comes to this; whether, if a man deviſe all his lands to *A.* ſubject to an annuity or rent-charge, and afterwards by a codicil, deviſe particular parts of them, without mentioning the rent charge,—Whether theſe parts are ſubject

1787.

Devonſher and others, *againſt* Newenham and others,

ject to the rent charge? The deviſe of them in the ſecond codicil to a different deviſee, is a revocation of the former deviſe, under which they were ſubject to the annuity. There is a remarkable difference between the two codicils. In the firſt, the teſtator confirms his will in all things not altered by that codicil. In the ſecond, he confirms only thoſe in favour of his wife. The firſt, therefore, is a republication in *toto*, except the parts altered, and ſo would paſs lands purchaſed after the making of the will, and before the making of the codicil. *Comyns Rep.* 383, 1 *Ves.* 437. *Cowp.* 132, 158. If the deviſes of *Shandangan Farranſeſhary* and *Lahane*, had thoſe words of general confirmation of the will, annexed, it might be contended that they paſſed *cum onere*, to the new deviſees. But there are no words of republication in his ſecond codicil. So that the new deviſe is, as to thoſe lands, a total revocation of the former deviſe and concomitant charge. If theſe lands were to be charged, the deviſees would take but part of what teſtator had declared they ſhould take the whole of; it might happen that the deviſees (and they too the heirs at law of teſtator) might never receive a ſhilling out of the land: the lands may (as has already happened) be diſtrained, or even ſold for the debts. The deviſe is a gift of the whole of thoſe lands, and new words were neceſſary to charge them *de novo*. In his will, when he deviſes his lands, he *expreſsly* charges them with the annuity; and when he comes to make a new deviſe of part, it ſeems ſtrange, that if he intended to charge it, he ſhould not *expreſsly* charge it likewiſe. But he only confirms the bequeſts to his wife.

The

1787.

Devonſher and others *againſt* Newenham and others.

The words he uſes for this purpoſe are relied on *contra*, as ſhewing his intent to continue the charge of the annuity on the lands newly deviſed. But the import of them is plainly this. "Tho' I have diminiſhed the fund originally charged with the annuity, by withdrawing from it the lands herein deviſed, yet I do not mean that my wife's annuity ſhould be diminiſhed." The reſidue of the original fund is amply ſufficient for the charge, and this the widow admits in her anſwer. It is objected that this would be the effect of the deviſe in the codicil, without the words of confirmation. But nothing is more common than a teſtator's throwing in ſuperfluous words, unneceſſary in point of law; and that ſeems to be the caſe here. His wife was the principal object of his favour, and under that impreſſion he might have made this laſt compliment to her.

Contra. The teſtator by his will, expreſsly charges the whole of his real eſtate with the annuity of 600*l.* for his wife, upon condition of her releaſing her proviſion under the deed; and he gives her a power of entering and diſtraining all and every part of it. To ſupport therefore the poſition contended for, on the other ſide, it lies upon them to ſhew that he has uſed unequivocal words in diſcharge of theſe lands. But however doubtful the point might be, upon the deviſes in the ſecond codicil, yet his words "and I confirm all my deviſes and bequeſts mentioned in my will and codicil in favour of my wife," following the deviſe, in the ſame ſentence, remove all doubt. Theſe are a republication of the will ſo far as it affects

affects the wife, and therefore eſtabliſh the annuity to her, in the extent of the remedy, as well as in the amount of it. If you confine the operation of theſe words to the amount, merely, of the annuity, you do it in contradiction to the teſtator's words, "I confirm all my deviſes and bequeſts, &c." There is no ground for preſuming that he meant to reſtrain her ſecurity; and if theſe words were not intended to republiſh the will as to the charge on theſe lands, what do they mean? for the deviſe of them would not diſcharge the other lands from the rent-charge. The teſtator intended that her ſecurity for the annuity ſhould be as ample as his eſtate. If he had intended her merely a ſufficient fund, he would have charged it originally upon only a competent part of his eſtate, whereas he charged it upon the whole; ſo that, it cannot be urged, with any force, that we ſeek to give a conſtruction to the latter words of the codicil, which is to create a ſuperfluous, not merely a ſufficient, fund. The allegations in the croſs bill, upon which the interference of a court of equity is ſought, are, the ſmallneſs of the eſtates deviſed in the ſecond codicil, and the ſufficiency of the lands deviſed to the general deviſee. Theſe the plaintiffs in that bill, have failed to ſubſtantiate by evidence againſt him. It is ſaid that it is againſt the widow, the injunction is prayed. But if you grant it, you affect the general deviſee, thro' that medium. It is not againſt her the decree would be, but againſt the other deviſee, whom you ought not to turn round to conteſt it and involve him in a circuity of litigation, and expence. It appears to have been the

1787.
Devonſher and others *againſt* Newenham and others.

1787.

Devonſher and others *againſt* Newenham and others.

the teſtator's intention, to give the bulk of his property to *John Newenham*. He obliges him to take his name; and he looks to him, to build up his name and family. He could not then mean to throw upon his eſtate of 1500*l. per an.* the entire burthen of this and the other annuities.

Yelverton Chief Baron. In his will he ſays, "I give all my lands to *John Newenham*, ſubject to a rent-charge of 600*l. per an.* for my wife;" and then he makes a codicil, and therein gives ſome of them to his nieces, and adds a clauſe confirming all the deviſes and bequeſts mentioned in his will, in favour of his wife. I think the natural and obvious conſtruction of this clauſe is this. Leſt it ſhould be ſuppoſed, from my deviſing away theſe lands to my nieces, that I mean to diminiſh that annuity, I confirm that annuity—meaning that, tho' the fund was diminiſhed, yet ſtill ſhe ſhould be intitled to the 600*l.* a year.

Power Baron. The only queſtion now before us, which is made by the prayer of the croſs bill, is, whether the widow ſhall be enjoined from diſtraining theſe lands for the arrears of her annuity. It is clear that by the ſecond codicil, they are deviſed, not ſpecifically charged. That being the only queſtion, and ſhe admitting that the other lands are of the value of 2000*l. per an.* I think ſhe ought not to be permitted to reſort, from that primary fund, to the lands particularly deviſed in the ſecond codicil; ſuppoſing it to be doubtful between the deviſees themſelves.

Hamilton

1787.
Devonſher and others *againſt* Newenham and others.

Hamilton Baron. In my opinion, the preſent queſtion does not apply to the right, but to the remedy. For if the other lands were inſufficient, I think theſe would be liable. But as ſhe admits the others are ſufficient, ought not a court of equity to injoin her from proceeding againſt theſe, and ſay to her, You ought to apply firſt to the general fund? But ſhe admits that to be ſufficient.

Metge Baron. I cannot help expreſſing a doubt of the conſtruction that has been made of theſe words in the ſecond codicil. By his will, the teſtator charged the whole and every part of his lands with the annuity for his wife, and, ſubject thereto, made a general deviſe of them. In the ſecond codicil he makes another deviſe of theſe particular lands, and, in as ſtrong words as poſſible, he confirms all his deviſes and bequeſts in favour of his wife. That is, in my opinion, giving her every remedy ſhe had before, that is, of reſorting to the whole, or any part of the lands. But with reſpect to the equity, that ſhe ought not to reſort to theſe lands, as ſhe admits the lands in the ſeiſin of the general deviſee, to be ſufficient, I have no difficulty in joining with my brethren. But upon the conſtruction, I think there is nothing to diminiſh her right of reſorting to any part of the deviſed lands.

Per Cur. Former decree amended by decreeing an injunction to reſtrain *E. H. Reeves*, and *Mary* his wife, from reſorting to the lands of *Shandangan*, *Farranſheſſary*, and *Lahane*, or any part thereof, for payment of ſaid *Mary*'s annuity, or any part thereof.

Upon

1787. Devonsher and others, *against* Newenham and others.

Upon an appeal to the Lords, both this decretal order, and that of the 17th *July* 1787, were reversed 20th *March* 1788. *Vide Post.*

End of Trinity Term.

Michaelmas

Michaelmas Term
28 Geo. III. 1787.

1787.
Friday, 9th November.
French *againſt* Langriſhe and others.

In the Exchequer.

FRENCH, Aſſignee of JOHNSON a Bankrupt, againſt LANGRISHE and others.

Covenant for rent. Plaintiff declares on a demiſe for years to the King, by indenture (not ſtated to be enrolled) between leſſor and the defendants, commiſſioners of the Barracks on behalf of the King; that defendants covenanted that they, on behalf of the King, would pay the rent; that by virtue thereof defendants entered, &c. declaration held bad on demurrer.

COVENANT for rent. The declaration recited, that on the 25th of *November* 1774, the ſaid *Johnſon*, by indenture between him, and the defendants, by the names and deſcriptions of, &c. *Commiſſioners and overſeers of the barracks in the kingdom of Ireland, on behalf of his ſacred Majeſty King George the 3d*, &c. for and in conſideration of the rents, &c. on the leſſee's part to be paid, &c. had granted and demiſed, and by the ſaid indenture did grant and demiſe *unto his Majeſty King George the third*, his heirs and ſucceſſors, all the &c. to have and to hold *unto his Majeſty*, his heirs and ſucceſſors, from the 29th *September* 1774, for 41 years, yielding and paying the yearly rent or ſum of 160l. by four quarterly payments; and that the ſaid defendants did covenant, promiſe and agree

to

1787.

French against Langrishe and others.

to and with the ſaid *Johnſon*, his executors, &c. that they the ſaid commiſſioners, *on behalf of our ſaid ſovereign Lord the King*, his heirs and ſucceſſors, ſhould and would truly pay, or cauſe to be paid to the ſaid *Johnſon*, his, &c. the aforeſaid yearly rent on the days and times aforeſaid, &c. By virtue of which ſaid demiſe, the ſaid defendants into the premiſſes with the appurtenances as aforeſaid demiſed entered, and were poſſeſſed and are yet thereof poſſeſſed. And altho', &c. the ſaid defendants have not performed the covenants, &c. on the part of the ſaid defendants to be performed. And in fact the ſaid plaintiff ſays that the ſum of 640l. of the yearly rent, for four years ending on the 25th day of *March* 1784, were and are yet in arrear and unpaid to, &c. The defendants pray *oyer* of the indenture, and it is ſet out, containing a clauſe, "that it ſhall be lawful for the ſaid commiſſioners, on behalf of his ſaid Majeſty, his heirs and ſucceſſors, at the end of three years from the date, to ſurrender the premiſſes, firſt giving 12 months notice in writing, &c. and that the ſame ſhall be delivered in good and tenantable repair." Alſo a covenant by the leſſor with the "ſaid commiſſioners, on behalf of his Majeſty, his heirs and ſucceſſors, that they the ſaid commiſſioners, paying the rent, and performing the covenants as aforeſaid, ſhall peaceably enjoy the ſaid demiſed premiſſes." They then plead that, as to 240l. of the yearly rent aforeſaid, for one year and an half ended on the 25th of *March* 1784, they, being commiſſioners and overſeers of barracks, did, on behalf of the ſaid

1787.

French *againſt* Langriſhe and others.

ſaid Lord the now King, on the 29th *September* 1782, ſurrender and yield up the ſaid demiſed premiſſes to the ſaid *Johnſon*, before he became a bankrupt, in tenantable repair, &c. and aver notice: and as to 400l. of the yearly rent aforeſaid, for two years and an half, ending on the 29th *September* 1782, they plead payment. Plaintiff confeſſes the payment, and demurs to the former part of the plea, aſſigning for cauſe, that it is not alledged that the ſaid *Johnſon* agreed to the ſurrender.

This caſe came on to be argued in *Michaelmas* term 1786, when Mr. *Downes* for the defendants, relied upon objections to the declaration. Mr. *Chamberlaine* in *Eaſter* term 1787, argued in ſupport of it. As the court obſerved that he ſtated the objections made by Mr. *Downes*, (during whoſe argument we were not preſent) very fairly; we ſhall give his argument here ſeparately.

Mr. *Chamberlaine*—Mr. *Downes*, in arguing this caſe, made no attempt to ſupport the plea; but inſiſted that the firſt fault was in the declaration, ſo that it was no matter how vitious the plea was. This I admit, with this reſtriction, that the fault relied on, muſt be a ſubſtantial one, ſuch as would occaſion the judgment to be reverſed, were it given for the plaintiff. But objections to form or matter of inducement are not ſufficient at this day. The defendants have lapſed their time to demur ſpecially. I contend that none of the objections taken to this declaration are ſuch as would be ſufficient to reverſe the judgment for the plaintiff, if he had obtained it. The firſt objection is this. That the King cannot take any

1787.

French *againſt* Langriſhe and others.

any intereſt in lands, but by matter of record. (*Yelverton* Chief B. Mr. *Downes's* objection was, that the demiſe, ſuch as it was, conveyed no eſtate to the crown.) In ſupport of this, he quoted 4 *Co.* 54, *b.* But that does not apply. What is there ſaid, relates only to the manner in which the King can take *freehold*. *Coke* there enumerates the means by which the King is intitled to any *freehold or inheritance*. Firſt, Matter of record, either judicial, as attainder; miniſterial, upon oath, as office; or conveyance of record, by aſſent, as fine, deed enrolled, &c. 2dly, Matter in fact, and found by office of record upon oath. 3dly, By matter in fact only, as eſcheats.—— The next caſe cited was *Lane* 31, 35, & 62. The facts of that caſe were theſe. In the 26th of *Elizabeth*, the biſhop of *Carliſle* made a leaſe in reverſion, for four years, to Queen *Elizabeth*. The ſucceſſor biſhop, made a leaſe to *Dimock*, who entered. Queen *Elizabeth* died. The leaſe to her is then enrolled, both leſſor and leſſee dead, and a third perſon having entered. To an information for intruſion, the leaſe by the ſucceſſor biſhop was pleaded; and a demurrer thereto was over-ruled, becauſe the firſt leaſe had not been enrolled during the lives of leſſor and leſſee. Enrollment was held the conſummation of the conveyance, and that it came too late. But it does not thence follow that, before enrollment, the leaſe was void; for the title might be inchoate, tho' not conſummate. Enrollment in the caſe of the King, is like entry in caſe of a common perſon. A tenant before entry has an *intereſſe termini*. A bargain and ſale muſt be enrolled

1787.

French *againſt* Langriſhe and others

enrolled within ſix months ; but is it void in the interim ? In caſe of a bargain and ſale to a man and his heirs ; though the bargainee die within the ſix months, yet the lands deſcend to his heirs ; ſo the conveyance is not void before enrollment. Suppoſe a bargain and ſale of a freehold, reſerving rent quarterly ; would not covenant lie for one quarter's rent, upon its becoming due, and before enrollment ? The king may enroll this leaſe now, or at any time ; and why ſhould not rent be recovered before enrollment ? Before enrollment the King has an *intereſſe termini.* Rent is recoverable on a leaſe for years, without ſhewing entry or occupation. *Bellaſis* v. *Burbrick*, 1 *Salk.* 209. 1 Lord *Ray.* 170. S. C. Covenant will lie againſt a tenant before entry. One branch of this objection was, that the king is no party to the deed, and therefore does not take primarily, and it is not alledged that he has accepted of this demiſe. I admit, if he has rejected this demiſe (he not being a party) no intereſt veſted in him, and then the leaſe is void. But I diſagree from the legal inference that is made from thence, that all the covenants therein are void alſo. (*Yelverton*, Ch. Bar. All ſuch covenants *as followed the eſtate*). I hope to ſhew that that is not the law. To ſupport it, have been cited, *Caponhurſt* v. *Caponhurſt*, 1 *Keb.* 131, 164, and *Walter* v. *Dean and Chapter of Norwich*, *Moore* 875. (*Yelverton*, Ch. Bar. Mr. *Downes* alſo cited *Yelv.* 18.) That was upon an *aſſumpſit.* The firſt caſe does not apply, neither is it law at this day. The ſecond is in point for the plaintiff. *Caponhurſt's* caſe is this, leſſee for a long term of years,

1787.

French *againſt* Langriſhe and others.

aſſigns what ſhall remain of the term after his death, covenants for quiet enjoyment, and gives a bond for performance of the covenants in the aſſignment. In an action on this bond, it was held void; for that the aſſignment was void, and therefore the covenant alſo, and conſequently the obligation. But that does not apply. For there, upon *Oyer*, on the face of the pleading, the matter of avoidance appeared; but here, though the leaſe were, in fact, void, for want of enrolment, or the King's not entering, does that defect appear upon the pleadings? Mr. *Downes* would have you intend it; but if you are to intend any thing, you are to intend the contrary; for they have pleaded payment of rent by virtue of this demiſe and a ſurrender, which imply that it veſted. Beſides, *Caponhurſt's* caſe is not law; for the law is this: Where a leaſe is void, implied covenants are void, but not expreſs ones. If a leaſe is void, the law cannot thence imply a covenant; but an expreſs one remains good. For this I rely on the caſe in *Moore* 875, S. C. *Owens* 136, 2 *Brownl.* 159. Where a covenant for quiet enjoyment was held good, though the leaſe were void. This is directly againſt *Caponhurſt's* caſe, and would be expreſsly in point for the plaintiff here, were not the covenant there collateral, for quiet enjoyment, whereas here it is for rent, and ſo inherent. But that diſtinction does not hold, for an expreſs covenant to pay rent is good, though the leaſe be void. This is fully proved by the caſe of *Monroe* v. Lord *Kerry*, 1 *Brown*, *Parl. caſes*, 334. There Lord *Kerry* had by indenture, dated the 14th *May*, 1697, demiſed to the plaintiff for 3 lives,

lives, to commence from the 17th of ſame month; with a covenant for payment of the rent. An action was brought upon this covenant in the court of Exchequer, wherein L.d. *Kerry* had judgment by default, and afterwards final judgment, which was affirmed in the *Exchequer Chamber*, and afterwards by the Lords; and there it was argued that this being an eſtate for life, without livery, was void, and alſo becauſe it was a leaſe of a *freehold*, to commence *in futuro*. But it was held, that this being an action of covenant upon a deed or indenture, under the hand and ſeal of the plaintiff, he was eſtopped from ſaying the leaſe was not a good leaſe: and this reaſon is given, that otherwiſe the tenant might enjoy the land, and yet the landlord have no remedy for his rent. The only poſſible way of ſupporting that leaſe, is by preſuming livery of ſeiſin on the day of the commencement of the demiſe. If that be preſumed there, that would be an authority for preſuming here enrolment and acceptance by the king; and the rather ſo, in this caſe, for the defendants have pleaded, as if the leaſe had been accepted. They ſay, they ſurrendered on behalf of the King, which implies that it veſted. But taking this in another point of view; ſuppoſe the court will not intend enrollment and acceptance. Yet they will not intend the contrary. Then the objection is this, that it is not alledged in the declaration, that the leaſe was enrolled, or that the king entered. But that is not neceſſary, the leaſe being only matter of inducement, and the defects in pleading it, are not ſuch as would occaſion the judgment to be reverſed, had it

1787.

French *againſt* Langriſhe and others

1787.

French *againſt* Langriſhe and others.

been given for the plaintiff. For this is an action on a contract, under hand and ſeal, which binds without any conſideration; and it matters not whether there was a demiſe or not. Any man may covenant to pay the rent of another's land. The covenant is a ſubſtantive, independent ground of action. That is proved by this, that to covenant for rent, on an expreſs covenant, the defendant cannot plead *non demiſit*; for matter of inducement, (which the leaſe is,) cannot be traverſed. There are numberleſs precedents where a demiſe or entry is not alledged at all. In *Wilſon* v. *Jeffrey*, *Cro. Eliz.* 195, the objection was, that the covenant was introduced by way of recital; but it was over-ruled. 2 *Keb.* 79, 54, S. P. The only reaſon why the demiſe is at all mentioned, is, that the covenant itſelf, does not mention the days of payment, but refers to the *reddendum* for them. So alledging a demiſe is not neceſſary, and therefore alledging enrollment and entry is not neceſſary, for the only uſe of it would be, to ſhew that there was a demiſe.

The ſecond objection made by Mr. *Downes* was, that the covenant here, is not a direct perſonal covenant by the commiſſioners; that they only covenant on behalf of the king. To this I anſwer, that the commiſſioners covenant *to pay on behalf of the King*; not that the king will pay, (though even that covenant would bind them; for A may covenant that B. ſhall infeoff, &c. and no conſideration is neceſſary, for it is a ſolemn contract under ſeal,) the defendants have covenanted for themſelves, that they themſelves will pay on behalf of his majeſty.

The

1787.

French *againſt* Langriſhe and others

The third objection is, that the breach is not well aſſigned; for that, if any intereſt paſſed to the King he took *cum onere*, and plaintiff ought to have averred, that he did not pay the rent. But here is enough to ſhew that no one paid the rent; for it is alledged to be in arrear and unpaid.

The fourth objection is, The plaintiff only ſtates himſelf aſſignee of *Johnſton*, according to the ſtatute, &c. and that he ought to have pleaded the commiſſion and aſſignment. If this would be ſufficient to reverſe the judgment for the plaintiff, it would be a very formidable objection indeed; for it would lie to every judgment here, and in *Weſtminſter-hall* for many years paſt. In 2 *Barnard.* 309, this objection was over-ruled. *Lilly's Ent.* 41, and other precedents in *Richardſon's Practice*, K. B. and C. B. are conformable to this.

Mr. *Byrne*, ſame ſide. All the objections to the declaration may be reduced to theſe three, 1ſt. that the demiſe is laid to be to the King, and the entry by the defendants. 2d. That it appears from the declaration, that two perſons were liable for the rent, one on the implied covenant in "*yielding and paying*"; the other on the expreſs one; and the breach is aſſigned in non-payment by one only. 3d. That the conveyance was not ſuch as would veſt an intereſt in the King. As to the firſt, in addition to the authorities cited, I refer to *Lit.* §. 289, where it is laid down that an intereſt veſts before entry. 5 *Co.* 124, *b.* S. P. Therefore the allegation of entry is ſurpluſage. But if it be neceſſary, the entry of defendants cannot vitiate, for it muſt be intended that they entered on behalf of the crown, it being pleaded

1787.

French against Langrishe and others.

ed to be by virtue of the demiſe, which could not be, unleſs it were on behalf of the King, to whom the demiſe is made. As to the ſecond; ſuppoſe a leſſee aſſigns; there both leſſee and aſſignee are liable for the rent. The former by the covenant, the latter by the enjoyment: and, nevertheleſs, in declarations againſt an aſſignee, it is never averred that leſſee did not pay, 1 Ld. *Ray*, 82, *Doug*. 174. As to the third objection, Mr. *Chamberlaine* has already ſhewn, that, even ſuppoſing the leaſe actually void, yet the covenant is binding. But I will endeavour to ſhew, that, from what here appears, you cannot intend the conveyance to be void: for firſt, matter of record is not neceſſary to veſt an intereſt of a chattel in the crown; and though it were neceſſary, the defendants are precluded from making this objection. Firſt, the doctrine that the king can take by matter of record only, and therefore that enrollment is neceſſary, relates only to freeholds, and does not extend to chattels. *Bro. ab. Prerogative le Roy*, 40. *Bro. ab. Faits enroll.* 6. There are, I confeſs, ſome authorities the other way, which ſay that enrollment is neceſſary in all conveyances, even of chattel intereſts, to the crown. Therefore it is neceſſary to reſort to principle, to ſhew why enrollment is neceſſary at all in any caſe, and thence to ſhew, that it is not neceſſary with regard to chattels. The reaſon why enrollment is required is this. It is ſettled law, that livery of ſeiſin cannot be made to the King, *Bro. ab. Faits enroll* 10. ſo that it became neceſſary to adopt, with reſpect to the crown, ſome other ſolemnity, in the place of the livery of ſeiſin. The ſolemnity adopted was

1787.

French *against* Langrishe and others.

was enrollment. So that enrollment is required in those cases only, where in the case of subjects, livery of seisin was necessary. The statute introduced that with respect to subjects, which before was necessary as to the crown. But secondly; there is no reason here to presume, nor shall defendants be permitted to alledge, that any thing essential is wanting to the conveyance. There is no reason to say that the lease was not enrolled, for any thing that appears upon the pleadings, and therefore it comes to this question, whether the want of alledging this circumstance can now be taken advantage of. The demise stated in the declaration, is mere matter of inducement, and so not to be taken advantage of now. Nothing can now be taken advantage of, that would not be a good ground of objection in arrest of judgment; which this would not be; for it would be cured by verdict. The distinstion between what would, and what would not, be cured by verdict, I take to be this: Where a material circumstance is omitted in the declaration, and there is nothing therein to lead to the proof of it at the trial, verdict does not cure: for then it cannot be intended that it was proved at the trial. Here the demise to the crown, being laid in the declaration, would lead to the proof of the enrollment, which would be necessary to perfect the conveyance, and therefore necessary to be proved at the trial. A case very similar to this, is that in 2 *Show.* 233. There, before the statute of attornments, grantee of the reversion, sued the lessee, and had a verdict. There was a motion to arrest the judgment, because the plaintiff had not averred attornment. But it was held that as

1787.

French *against* Langriſhe and others.

as the grant of the reverſion was alledged, which could not be good without attornment, it muſt be intended that the attornment was proved at the trial. Now was attornment more neceſſary in that caſe, than enrollment here? The defendants admit an enjoyment under the demiſe; by this they have taken away the force of their own objection, that nothing paſſed, and therefore there was no conſideration for the covenant. But I contend that an enrollment, after filing the declaration, would be ſufficient, and would operate by relation, *Bro. ab. Prærog. del roy* 57. 2 *Roll. ab.* 399, 2 *Leon.* 207.

Mr. *O'Neil, contra.* It is admitted that a ſpecial demurrer would have lain here; but if the declaration is liable to a demurrer at all, it muſt be to a general demurrer; for here it appears from the deed, ſet out upon *Oyer*, that no pleading could entitle the plaintiff to recover upon it. The plea, I admit, is bad; but that does not cure the faults of the declaration. The crown cannot take a chattel real, except by matter of record, or enrollment, which is tantamount thereto. It is ſaid enrollment is mere ceremony. But is not ſo. Nothing paſſes without enrollment, in the caſe of the crown. The counſel on the other ſide, have taken up their idea from the ſtatute of enrollments. In caſes, to which that ſtatute relates, I admit the enrollment is but ceremony. But this, with reſpect to the crown, is a common law caſe. The principle is laid down in *Lane* 31, 35, and 60. and in 4 *Co.* 54. Then if the leaſe is void, an auxiliary covenant, ſuch as that for the payment of the rent, is void alſo. *Caponhurſt's* caſe already cited,

1787.

French *againſt* Langriſhe and others

cited, is an authority for this. The concluſion there is law, tho' perhaps the firſt part is not law. 1 *Sid.* 308. 1 *Saund.* 6. S. P. In *Yelv.* 19. is this general poſition, that, if covenants depend upon a leaſe, if there is no leaſe, there are no covenants. 3 *Lev.* 193. S. P. If this be law, the covenant here is void, the leaſe being ſo, for no eſtate paſſed to the crown, as has been already ſhewn, though it was intended to paſs one, and certainly no eſtate paſſed to the commiſſioners. There are no words importing that the leaſe was made to them, nor is there an implied covenant by them; for the words, "yielding and paying," apply only to the crown. It is ſaid that the commiſſioners, having covenanted to pay the rent for the crown, are bound to pay it, though the crown would not have been bound. But if one aſſume to pay money for another, which that other is not bound to pay, neither is he who aſſumed, bound. The only difference in this reſpect, between covenant and *aſſumpſit*, is, that one is by deed, the other not. The demiſe here is to the crown, and there is a covenant that other perſons ſhall enjoy, which is abſurd. If there had been no demiſe ſtated to the crown, that covenant might have been a good demiſe to the commiſſioners. Two caſes have been cited on the other ſide, to controul thoſe I have cited, namely *Monroe* v. Lord *Kerry*, and *Northcote* v. *Underhill*, 1 Ld. *Ray.* 388. *Salk.* 199. In the former, there was a freehold leaſe to commence *in futuro*. It is ſaid there was no livery, and therefore that it was void; which I deny, for if livery were given at the commencement of the leaſe, it

1787.

French *againſt* Langriſhe and others.

it would have been good; livery is never pleaded: but if the party plead *dedi* or *demiſi*, the court will preſume that livery was given at the time when it ought to have been, particularly where it is ſtated that leſſee entered. The latter caſe was that of a mortgage, with a covenant for the payment of the money. It would have been a ſtrange objection to allow the mortgagor to make, after having received the money, that the mortgage was bad, and therefore that he ſhould not be obliged to repay the money.

This caſe was argued by other counſel, but we were not preſent during their arguments.

On this day, (9th *November*, 1787) the court of Exchequer gave judgment for the defendants, on account of the faults of the declaration, but did not aſſign their reaſons.

Same day. Greville *againſt* Boddy.

Greville againſt Boddy.

To declare in covenant for a part of a quarters rent, without ſhewing that the reſt was paid is bad on ſpecial demurrer.

COVENANT for rent, by leſſor, againſt the aſſignee of the leſſee.—The yearly rent of 18*l.* was reſerved, payable by four equal quarterly payments—and the breach was aſſigned in the non-payment "of 28*l.* 10*s.* for ſix quarters rent, ending the 1ſt. of *May*, 1785, and alſo for 1*l.* 10*s.* part of a quarter's rent, due and ending the 1ſt of *November*, 1783." Defendant demurred ſpecially to the declaration, aſſigning for cauſe, that plaintiff did not alledge the portion of time particularly, of which ſaid part of a quarter did conſiſt, for which the ſaid 1*l.* 10*s.* is charged; nor alledge whether, or how the reſidue of ſuch quarter's

1787.
Greville. *againſt* Boddy.

quarter's rent was paid or ſatisfied. Another cauſe aſſigned, was, that the aſſignment to defendant was laid without a *Venue*. *

Mr. *Guinneſs* in ſupport of the demurrer, cited *Yelv.* 30. to ſhew that where the breach is not aſſigned in the words of the covenant, but ſhorter or larger than the covenant, it is bad. Here the covenant is, to pay by four equal quarterly payments, and the breach is that 28*l.* 10*s.* is due for ſix quarters, and for 1*l.* 10*s.* a portion of a quarter, without alledging the reſidue to be ſatisfied. Mr. *Guinneſs* being ſtopped by the court, Mr. *Dickſon*, *contra*, in anſwer to the objection to the want of a *venue*, ſaid that the aſſignment was always preſumed to have been made on the land, and cited for this, 2 *Mod.* 304. to which the court agreed; but on the other point they ſeemed of opinion, that plaintiff ought to have declared for the ſeven quarters, or have acknowledged ſatisfaction of the reſidue.

2 *Lev.* 56, and 57. Lord *Middleton*, v. Executors of *Barry*, *H.* 27. G. 3. in this court, *antea* 81. were cited.

Leave was given to amend.

The

* So it was repreſented to, and underſtood by the court; whereas the aſſignment was laid with a *venue*; and the objection, on the pleadings, was that the *enjoyment* by defendant as aſſignee, was laid without a *venue*. This we mention to obviate the imputation of miſtake.

1787.

Saturday, 10th November, Paul *againſt* Forbes and others.

The Reverend T. Paul, Doctor of Divinity, againſt Forbes and 26 others.

Bill againſt ſeveral, for diſcovery and payment of tithes ſubtracted, and to be decreed payment in future, demurred to, for charging ſeveral and diſtinct matters againſt ſeveral defendants, and for tending to draw the queſtion of ſubtraction from its proper juriſdiction. Demurrer overruled for informality, for not denying combination, and becauſe the plaintiff is intitled to the diſcovery.

THE plaintiff in his bill ſtated himſelf entitled, as rector of the pariſh of *St. Thomas*, in the city of *Dublin*, to the tithe of hay, annually growing on certain grounds, called the *North Lots*, within the ſaid pariſh, now and for many years occupied by the defendants reſpectively, to whom applications had frequently been made for the tithes of hay, for the time they had held during the plaintiffs incumbency; and in particular, that in the years 1785 and 1786, before the ſeaſon for cutting and ſaving hay, the plaintiff had cauſed written notice to be ſerved on the defendants, that he expected to be paid the tithe of the hay for thoſe two, and the ſucceeding years, but that they had drawn it off without giving notice, or laying out the tithe, or making any compenſation for the ſame; that they conceal what quantity of meadow each of them occupies in the ſaid pariſh, and what quantity of hay each of them has made, and the value of the tithe thereof. The biil prays, that each of the defendants may for himſelf ſet forth, what lands he holds in the ſaid pariſh, and has held and occupied therein in each year during the plaintiff's incumbency, and diſtinguiſh his own particular part; and upon a diſcovery of the quantity, nature and value of the ſaid hay, and of the tithes thereof, may pay and anſwer to the plaintiff, all ſuch tithes and

1787.
Paul *againſt* Forbes and others.

and dues, as during the ſaid time ſhall appear to have been juſtly due and owing to the plaintiff, and for the future continue to pay the ſame as they ſhall grow due. The plaintiff waved the treble value. To this bill, the defendant *Forbes* demurred, for "that the plaintiff's proper remedy is in the conſiſtorial courts of this kingdom, which are competent to give full and adequate relief therein, to whoſe proper juriſdiction, all cauſes relative to the ſubtraction of tithes belong, according to the laws and ſtatutes of this realm, and as it does not appear by the ſaid bill, that the right of the plaintiff to ſaid tithes in kind, is in queſtion, but the complaint is merely of the non-payment or ſubtraction thereof by the ſeveral perſons made defendants; ſaith the ſaid bill is exhibited againſt this defendant, and againſt *W. Ennis*, &c. for ſeveral diſtinct matters, and by the mingling ſeveral defendants and cauſes together in one bill, the pleadings, orders, and proceedings in the progreſs of the ſuit, will be intricate and prolix, and this defendant will be put to unreaſonable and unneceſſary charges therein, and ſaith that the diſcovery and relief ſought by the ſaid bill, is unuſual and unprecedented, and it tends to the drawing of the queſtion of ſubtraction of tithes from their proper juriſdiction, and is moreover vexatious and unneceſſary, and tends to the multiplying vexatious, unneceſſary, and improper ſuits in this court; for which reaſons, &c.

For the demurrer, the Attorney General and Mr. *Burſton*.

The only queſtion is, whether the plaintiff can come here to ſue for tithes, where there is no difficulty or impediment to prevent him from ſuing in the ordinary manner in the eccleſiaſtical

1788.

Paul *againſt* Forbes and others.

eccleſiaſtical court? Under the ſeveral ſtatutes, complete remedy may be there had, and the proceedings are more beneficial for the laity as well as rectors, being cheap and expeditious; ſo that it is not expedient or proper for this court to go beyond the ordinary mode of relief. There are only two caſes where a party has a right to come into this court for tithes. Where the right is diſputed; or where there has been an actual combination to deprive the rector of the relief intended him by thoſe ſtatutes; neither of which caſes is pretended by this bill. The complaint is of a mere ſubtraction of tithes, and there are no facts of combination ſpecifically charged. There are in effect twenty ſix different bills included in one, requiring as many anſwers, accounts, and decrees.

Power B. If the defendant had demurred only becauſe the bill had charged ſeveral and diſtinct matters againſt ſeveral defendants, he ought to have denied combination. But here the demurrer denies all equity; and if there be no equity, as againſt the defendant demurring, he has no occaſion to deny combination; it therefore reſts on the plaintiff to ſhew that there is equity in the bill.

Mr. Prime Serjeant and Doctor *Duigenan*, *contra*. That this is a proper bill appears from numberleſs authorities; the moſt modern is 1 *Wils.* 128. there the Lord Chancellor ſaid the court has never diſmiſſed bills for tithes, to leave the plaintiffs to ſuits in ſpiritual courts, or at law, except where there has appeared to be any good legal or equitable bar or defence. 1 *Vern.* 60. 2 *Chan. Cas.* 237.

1787.

Paul *againſt* Forbes and others.

237. 1 *Chan. Cas.* 233. 3 *Atk.* 590. *Hard.* 116, 190. *Bunb.* 28, 60. 2 *P. Wms.* 463. *Watſon's Clergyman's Law*, 485. *Freem.* 303; all lead to eſtabliſh the juriſdiction of this court to give relief in caſes of tithes. Then as to the demurrer itſelf, it is bad in point of form, for it ſhould deny combination, *Vern.* 416. *Roth* v. *Butler* and another, in this court, (*ante* 85.) and in 1 *Atk.* 282. in which laſt it was held, that ſuch a demurrer muſt deny combination, and alſo, that it does not hold to a bill for tithes, for it is for one right.

Yelverton Ch. B. If this had been a demurrer to the relief only, and not to the diſcovery, and the combination charged had been denied, I ſhould have inclined to allow the demurrer. But here the defendant has demurred to the whole relief, and the whole diſcovery. Beſides it is a kind of argumentative demurrer; for it goes on, ſtating that the bill tends to the drawing the queſtion of tithes from their proper juriſdiction. I found my opinion for over-ruling this demurrer, on the informality of it.

Power B. We have no occaſion now to decide whether the plaintiff will be intitled to any and what relief at the hearing. This demurrer goes to the diſcovery and the relief, and I ſee no reaſon to preclude the plaintiff from the diſcovery, and on that I give my opinion, that it muſt be over-ruled.

Hamilton B. I give no opinion on the general queſtion of the relief. As to the juriſdiction of the court there is no doubt; but whether equitable circumſtances to call for its interference are not required, admits of ſome

1787.

Paul *againſt* Forbes and others.

ſome doubt. Here the demurrer has not denied combination, as it ought; beſides it is a general and a ſpecial demurrer run into one another; therefore, for precedent ſake, I think we ought to over-rule the demurrer.

Metge B. Concurred.

Per Cur. Demurrer over-ruled.

Friday 16th Novemb. Lane *againſt* Carmichael. A ſurviving nominal partner, is not competent to be a witneſs in ſupport of an action by the executor of the deceaſed partner, for a partnerſhip debt.

LANE, Executor of the Executrix of JOHN LANE againſt CARMICHAEL.

THIS was an action of *aſſumpſit* for the amount of the bill of coſts of *John Lane*, as agent in conducting the cauſe of *Murray* and *Bateman*, in the Houſe of Lords in *England*, upon an appeal from a decree of the Court of Chancery here. It was brought againſt the agent here, upon the ground of his having employed the agent in *England*. It was tried before the Lord Chief Baron. The only witneſs in ſupport of the action was *Thomas Lane*, the ſon of *John Lane*. He was examined on the *Voir dire*, and it appeared that, before that tranſaction, he had been taken into partnerſhip by his father, and continued therein 'till his father's death; but that he was made a partner merely for the purpoſe of introducing him into the buſineſs, and was not to have any ſhare in the profits. It alſo appeared, that under his father's will, he was intitled to a ſhare in the reſiduum; but the witneſs produced a releaſe by him to the executor, of his ſhare of what might be recovered

1787.
Lane
againſt
Carmichael.

recovered in this action. The counſel for the defendant made two objections to the competency of *Thomas Lane*, and relying on them, made no defence. The firſt was, that by his having been made a partner, he was liable to the partnerſhip debts; and in truth ought to have been the plaintiff in the action. The ſecond was, that he being intereſted in the reſiduum under the will, the ſpecial releaſe was not ſufficient. The Chief Baron conſidering that the witneſs had been brought from *England*, and that if he ſhould reject his teſtimony, and his opinion ſhould be over-ruled by the court, it would occaſion a great additional expence, admitted him to be examined, and a verdict was found for the plaintiff, ſubject to the opinion of the court upon the objections to the competency.

The Recorder argued for the defendant, that the witneſs was diſqualified to give teſtimony by his having been a partner with his father, in whoſe right the action was brought. His being a nominal partner, and not having any ſhare in the profits of the buſineſs, makes no difference as to his ſituation in reſpect to third perſons. He was, nevertheleſs, liable to the partnerſhip contracts and debts. This very action ought to have been brought in his name, for tho' the benefit does not ſurvive, the remedy does; the right of action is in the ſurviving partner, and having recovered, he is accountable for the proportion of the deceaſed to his executor, 2 *Salk.* 444. 1 *Show.* 188. The reaſon of taking the witneſs into partnerſhip was, profeſſedly, to introduce him into the buſineſs of his father. That could only be done by his having a right

1787.

Lane against Carmichael.

ſurviving to him, of ſuing for the bills of coſts, which would prevent the clients from withdrawing their buſineſs from his office and reſorting elſewhere.

Mr. *Burſton* and Mr. *Warren* were to have argued on the other ſide; but they admitted that *Thomas Lane's* being liable to the partnerſhip debts, was a deciſive objection to his competency. Mr. *O'Connor* ſame ſide, obſerved, that the objection to the manner of bringing the action, could only be taken advantage of by plea in abatement, and not in evidence.

Power Baron. (Having examined the bills of coſts furniſhed to the defendant) obſerved, that they were deciſive againſt the admiſſibility of *Thomas Lane's* evidence. For they were made out inthe names of *John* and *Thomas Lane*; and of courſe, *Thomas* ought to have been plaintiff in the action. Beſides, he was intereſted by being a partner; for even a ſecret partner is liable for the debts due by the partnerſhip; conſequently *Thomas Lane* was intereſted in the fund to be applied in the payment of them; the increaſe of which was ſought by this action.

Hamilton and *Metge* Barons, concurred, upon the ground of the witneſs being intereſted in the fund for payment of the debts.

Yelverton Ch. B. My opinion of the incompetency of *Thomas Lane*, is founded on his being a partner, and therefore liable for the debts, and conſequently intereſted in the increaſe of the fund by which they were to be diſcharged.

Nonſuit entered.

Sir

1787.

Same day. Hamilton *against* Wright.

Defendant, in a deed together with others severally covenants to pay one-fixth of the expence of plaintiff in obtaining a diviſion of certain lands and in redreſſing the injuries all the parties had ſuffered. Plaintiff avers that he had obtained a diviſion and redreſſed the injuries which the defendant had ſuffered. Special demurrer, for not averring that plaintiff had redreſſed the injuries of all the parties, allowed.

Sir JAMES HAMILTON, Knt. againſt WRIGHT.

THE Defendant and ſeveral others had, by deed executed between them, impowered the plaintiff to take legal ſteps for obtaining a juſt diviſion and partition between them, of certain lands in the county of *Monaghan*, and for obtaining redreſs of every other injury that any of the partners, parties to the deed, have or hath ſuſtained by reaſon of the want of ſuch partition. The defendant covenanted therein to pay one ſixth part (*i. e.* $\frac{1}{3}$ of $\frac{1}{4}$) of ſuch expences and coſts, as the plaintiff might be put to on account of ſuing for and obtaining ſuch diviſion, and for obtaining ſuch redreſs of every ſuch injury as the parties to ſaid deed had ſuſtained. In covenant thereon plaintiff averred that "he did ſue for, and did afterwards, that is ſay, on &c. at &c. obtain and procure a juſt and proper diviſion and partition of the ſaid lands, and redreſs of every injury which the ſaid *Joſeph Wright* (the defendant) had ſuſtained, for or by reaſon of the want of ſuch diviſion and partition, and that in ſuing for and procuring the ſame, he, the ſaid plaintiff, expended a ſum of 770l. 17s. 9d. and that two third parts of one fourth of the ſaid ſum amounted to a ſum of 128l. 9s. 7½d." and aſſigns a breach in non-payment thereof. Defendant demurred to the declaration, and aſſigned for cauſe, that the plaintiff did not ſhew that he had obtained redreſs of every injury that the ſaid ſeveral partners and parties to the ſaid indenture had ſuſtained for or by reaſon of the want

1787.

Hamilton against Wright.

of ſuch diviſion or partition as in the ſaid indenture is mentioned.

Mr. *Burſton* for the defendant. The declaration does not purſue the ſpirit and meaning of the deed; for by the covenant, the defendant is liable for the ſixth part, not merely of the expences incurred in redreſſing his own injuries, but of thoſe incurred in redreſſing the injuries of all the partners together. The admitting of the action in the preſent form, would lead to the bringing of ſeveral actions againſt the defendant, inſtead of one only, for his proportion of the aggregate ſum; for after having recovered from the defendant upon the preſent declaration, the plaintiff might ſue him for his proportion of the expence of redreſſing the injuries of the other partners. It is not averred that they ſuſtained no injury. It is evident from the deed, that the defendant is not liable to pay any thing, 'till the injuries of all ſhall have been redreſſed, and the groſs ſum of the whole expence aſcertained. He has covenanted to pay one ſixth of the expences and coſts, not only of obtaining a diviſion, but alſo of obtaining redreſs of the injuries of all the partners. It never could be the intention, that the defendant ſhould pay only one ſixth of the expence of redreſſing his own injuries; of thoſe he ought to pay the whole.

Mr. *Caldbeck*, *contra*, argued that this was a ſeveral covenant, and to be taken as if it had been in a ſeparate deed. The plaintiff avers that he has procured a diviſion for all the partners, and that he had redreſſed the defendant's injuries; the expence of which he ought to pay. It is ſufficient for the defendant

1787.

Hamilton *againſt* Wright.

fendant that his own injuries are redreſſed. It does not lie in his mouth to object that the injuries of the others are not.

Yelverton Ch. B. The averment of performance ought to be commenſurate with the covenant. But the plaintiff does not aver that he had obtained redreſs for all the injuries of all the other partners, parties to the indendenture; but only of thoſe ſuſtained by the defendant, ſo that the averment is narrower than the covenant. If this had been on a general demurrer, perhaps the defect might be ſupplied by inference and argument, but being ſpecially aſſigned as cauſe, the objection is good.

Per Cur. Demurrer allowed, but leave given to amend.

Thurſday, 22d. November.

Gill *againſt* Fleming

GILL againſt FLEMING and AL'.

Decree on an appeal affirmed, with coſts. The coſts may be proceeded for in the office in the uſual way, without a motion for that purpoſe.

THE plaintiff had appealed from a decree of this court, which was affirmed by the Lords, with 100*l.* coſts. and the decree of the lords had been received by the court. Mr. *Brownrigg* now moved for an attachment againſt the plaintiff, for not paying thoſe coſts.

Per Cur. There is no occaſion for a ſpecial motion for the purpoſe. You may proceed in the office by ſubpæna and attachment in the uſual way.

O'BRIEN

1787.

Friday, 23d, November.
O'Brien *againſt* Engliſh.

Where a party anſwers perſonal interrogatories, as upon an attachment, the oppoſite party may except to the anſwers at the bar, if they be ſhort or evaſive.

O'Brien againſt English.

THE plaintiff had anſwered perſonal interrogatories as upon an attachment. Mr. *Butler* now moved to except, at the bar, to ſeveral of the anſwers, as being ſhort and evaſive. For this practice he cited 1 *Howard, Excheq. Plea ſide* 85, and the court allowed it to be followed in this caſe, and ſome of the anſwers appearing ſhort, the interrogatories were ſent back to the officer, that they might be fully anſwered.

Saturday, 24th November.
Humphrey's *againſt* Brewer.

Mother appears for a minor defendant, as guardian, tho' not really ſo, the court will not on that ground ſet aſide the appearance.

Humphreys, executor of Healy, againſt Brewer, an infant, and others.

SARAH BREWER had appeared for the defendant, as his mother and guardian, tho' not his teſtamentry guardian, or appointed by rule of court. Mr. *White* now moved, on behalf of the plaintiff, to ſet aſide that appearance, and that the plaintiff might be at liberty to proceed to enforce a regular appearance.

Per. Cur. (*abſente Yelverton*, Ch. B.) This motion is quite irregular. The court can not make ſuch a rule. As the mother has appeared and acknowledged herſelf to be guardian, you muſt proceed and oblige her to anſwer as if ſhe were ſo. If ſhe ſhould hereafter refuſe to put in an anſwer, it will then be time enough to make this motion.

No rule.

Cooper

1787.

Same day. Cooper *againſt* Fleming & al'.

Cooper againſt Fleming and another.

Bill againſt a cuſtodee for an account, Demurrer for that the Attorney General was not a party allowed.

BILL brought by an outlaw againſt the cuſtodee and receiver, for an account of the rents and profits of the lands granted in *cuſtodiam*. Demurrer for that the Attorney General was not a party. Mr. *A. Boyd* for the demurrer, not oppoſed.

Per. Cur. Demurrer allowed.

Fox, adminiſtrator of Fox, againſt Mossom.

Monday, 26th November, Fox *againſt* Moſſom, Return of *nulla bona*, muſt purſue the words of the writ, and aver that defendant had not goods, &c, whereout to levy the debt, damages, and coſts, or any part thereof.

ON ſhewing cauſe why the ſheriff ſhould not amend his return of *nulla bona*, and why he ſhould not be attached. Sir *Fred. Flood* ſhewed ſufficient cauſe againſt the attachment; but Mr. *Chamberlaine* objected to the form of the return; it being. "that the defendant had not any goods or chattels, whereout the ſheriff could levy the amount of the *debt and damages* within mentioned, or any part thereof," whereas it ought to be "*debt, damages, and coſts*, or any part thereof," in purſuance of the writ. He cited *aſſignees of Eſkildſon* v. *Fitzgerald*, as a deciſion of this court, in point.

Per. Cur. The return ought to purſue the writ. Diſallow the cauſe, and let the Sheriff amend forthwith.

Leſſee

1787.

Same day. Willock *againſt* Brown.

Leſſee of WILLOCK and JOHNSON, againſt BROWN.

The recital of articles before marriage, and of payment of part of the wife's portion, as a conſideration, in an old ſettlement made after marriage, is *prima facie* evidence of the articles, and of the payment, and therefore that the ſettlement was not voluntary. And there being no evidence to contradict it, the judge is right in directing the jury to find for the ſettlement.

UPON a motion to ſet aſide the verdict for the plaintiff, and to enter a non-ſuit. *Hamilton*, Bar. reported that this was an ejectment on the title, tried before him at the laſt aſſizes for *Downpatrick*. The plaintiff gave evidence that the lands in queſtion were in 1734, the reputed eſtate of *Richard Johnſon*, the father of one of the leſſors of the plaintiff, and on his death, which was about fifteen years ago, came to the leſſor of the plaintiff his eldeſt ſon. On the part of the defendant, was produced a leaſe for 999 years, made in 1754, by *Richard Johnſon*, at 3*l. per. annum*, to commence after the determination of a leaſe to one *Gilleſpie*, of which ſeveral years were then unexpired. The plaintiff to rebut that evidence produced a deed of ſettlement, dated 19th *June*, 1734, by leaſe and releaſe between ſaid *Richard Johnſon*, and truſtees, and *Mary Melville* widow, and *Anna Maria Johnſon*, otherwiſe *Melville*, the wife of ſaid *Richard Johnſon*, which recited, that by articles before marriage, between *Richard Johnſon*, and *Anna Maria* his wife, it was agreed that he ſhould ſettle part of his real eſtate for the payment of his own and his father's debts, and of his brothers and ſiſters portions, and ſubject thereto in ſtrict ſettlement, and then that the marriage took place; and in execution of the ſaid articles, and in conſideration of

67*l.*

67*l.* 18*s.* being the balance due to *Richard Johnſon* in right of his wife, and then paid by *Mary Melville* her mother, *Richard Johnſon* conveys according to the recital of the articles. This ſettlement was regiſtered 10th *Auguſt*, 1734. It was objected on the part of the defendant, that this ſettlement upon the face of it appeared to be voluntary, and that the defendant being tenant under the leaſe for 999 years, at what *they* called a rack rent, was a purchaſer for valuable conſideration, and ſo the ſettlement void againſt him, unleſs the articles could be produced; which the plaintiff not being able to do, the defendant inſiſted that he ought to be non-ſuited. The learned judge ſaid he did not conſider it in that light, for it made proviſion to pay debts, and was in conſideration of part of the wife's fortune; nor did he think, that at the diſtance of 50 years, it was abſolutely neceſſary, that the articles ſhould be produced. This being the only evidence on that point, he directed the jury to find for the plaintiff. He reported further, that there was a contrariety of evidence, as to the defendant's being in poſſeſſion under that leaſe; that receipts of rent were produced to ſhew that the leſſor of the plaintiff, the remainder-man under the ſettlement, had confirmed the leaſe. They were for 4*l.* 15*s.* whereas the rent reſerved by the leaſe was only 3*l.* but the variance was accounted for, by the defendant's holding other lands under the leſſor of the plaintiff.

1787.
Willock *againſt* Brown.

For the motion, Mr. *Caldbeck*, Mr. *Macartney*, and Mr. *Blackburne*. The queſtion is, whether a ſettlement after marriage, executed ſeveral years ago, and reciting to be purſuant to

1787.
Willock *againſt* Brown.

to articles before marriage, ſhall be conſidered voluntary or not, againſt a purchaſer for valuable conſideration; for ſuch, a tenant at a rack rent, is; 2 *Vern.* 327. *Doug.* 22. 9 *Mod.* 59. All ſettlements made after marriage without ſome actual conſideration, excluſive of the marriage, are voluntary, *Cro. Jac.* 158, and other caſes cited 2 *Bac. ab.* 608. As to the recital of the antecedent articles; it is no evidence of their exiſtence. Before the ſtatute, the recital of a leaſe in a deed of releaſe, was no evidence of the leaſe. As to the 67*l.* then alledged to be paid, it was the balance of a debt due to *Richard Johnſon*, ſo cannot be a conſideration for the ſettlement. The payment of it gave him nothing, but what he was before entitled to upon the marriage.

The Attorney General, Mr. *Dunn*, and Mr. *Hamilton*, *contra*. The recital of the articles is clearly evidence of their exiſtence againſt the grantor, and all claiming under him; ſo it is laid down in *Gilb. Law of Evidence*. Of the deed itſelf, the leſſee had legal notice, for it was regiſtered 20 years before the making of the leaſe. He ought to have reſorted to it, and the recital ſhould have led him to ſatisfy himſelf concerning the exiſtence of the articles; ſo that he had legal notice of the articles alſo. If there were ſuch, the ſettlement in purſuance thereof, is not voluntary. But admitting the recital not to be evidence of the articles; yet the payment of the reſidue of the wife's portion, was a ſufficient conſideration for the ſettlement. For a court of Equity would have warranted the withholding of it, till a ſettlement had been made. But even though it were voluntary, it will not be therefore void; unleſs

1787.

Willock *againſt* Brown.

unleſs it were alſo fraudulent, it will be good againſt a purchaſer. Its being voluntary, operates only as evidence of fraud. *Cro. Jac.* 158, and in *Cowp.* 705, Ld. *Mansfield* "ſays there is not a word in the ſtatute impeaching voluntary ſettlements merely as ſuch." Here there was no pretence of fraud. The ſettlement was regiſtered in 1734, and the leaſe was not made till 1754, and the jury have decided, that there was no fraud. Beſides this objection lies only in the mouth of a purchaſer for a valuable conſideration, which a tenant at ſo trifling a rent cannot be eſteemed to be. As to the articles not having been produced. It can ſcarcely be ſuppoſed that they could. Articles are merely ſhort notes by way of inſtructions for drawing ſettlements at length, and when theſe are executed, the articles are *functi officio*, and ſeldom preſerved. Add to this the length of time ſince the execution of them. And it is clear the defendant conſidered the ſettlement as good; for the receipts were offered to ſhew that the leaſe had been confirmed by the remainder-man under the ſettlement.

Yelverton, Ch. Bar. The only point made below, was, that the plaintiff ought to be nonſuited, which was ruled as it ought. The recital of the article in ſo old a deed, was undoubtedly evidence to go to the jury of their exiſtence, and there was evidence, that the ſettlement was for valuable conſideration, and there was none to impeach it. I think, therefore, that it went to the jury with proper direction to find for the plaintiff.

Power, Bar. I confeſs that I did at firſt wiſh, that this caſe ſhould go back, (but without coſts,) when I conſidered that the queſtion

1787. Willock *againſt* Brown.

tion was, whether the recital of the articles was to be in effect concluſive evidence of their exiſtence. I ſay, in effect, for if a judge tell the jury that they ſhould find for the party giving the evidence, without directing them to conſider, whether it be true or falſe, it is in effect to tell them that it is concluſive. As to the payment of the 67*l.* the law is clearly ſettled, that if the wife be entitled to a ſum of money, which the huſband cannot get at, without reſorting to a Court of Equity, the paying of it to him, without driving him to a ſuit, will make a ſettlement in conſequence thereof, be for valuable conſideration. But that brings it back to the firſt queſtion. If this ejectment had been brought ſeveral years ago, when the plaintiff's right firſt accrued, it would have ſtood clear of the objections, which now ariſe in my mind; but here he has lain by for 15 years. That is the circumſtance which would induce me to leave the evidence to the jury, with obſervations. The judge certainly was not warranted to non-ſuit the plaintiff, for as to the exiſtence of the articles, the recital certainly was ſome evidence of it, though not concluſive. So the recital of the payment of the 67*l.* was evidence of it, to go to the jury. But if it had gone to them with obſervations, which I have no doubt the judge would have made, had not the defendant inſiſted on a non-ſuit; it might have had a different effect upon them, and perhaps they might have found a verdict for the defendant. Therefore I think it ought to go back, without coſts.

Hamilton, Bar. adhered to his former opinion, upon that which was the only point made

made below, that the plaintiff ought to be non-ſuited. 1787.

Willock *againſt* Brown.

Metge, Bar. I agree in the obſervation made by Mr. Attorney General. With what view were the receipts for rent (which were the only evidence on the part of the defendant) produced? It was to ſhew that the leaſe was confirmed by the remainder-man. How could that be, if the ſettlement were not good? Their language was this: We admit the ſettlement to be a good one, (that is, there is evidence of it to go to the jury, and ſo the court is of opinion) but as you the plaintiff, have received the rents, you have confirmed the leaſe. But if the defendant deny the neceſſity of his confirming it; the queſtion then is, was there evidence of the articles? The recital certainly was evidence, and ſince it was the only evidence, excepting the receipts, the judge was right in letting it go to the jury, and coupling that with the antiquity of the deed and poſſeſſion accompanying the ſettlement, at leaſt not in oppoſition to it, for a number of years, how could the judge charge otherwiſe than he did?

Per. Cur. Motion refuſed without coſts.

Wedneſday, Nov. 28th, Wenſell *againſt* Saunders.

WENSELL againſt SAUNDERS.

MR. *Thompſon* to ſhew cauſe of bail, relied upon an affidavit of the debt, made by the plaintiff before a Burgo-Maſter in *Holland*, certified by him, and accompanied by an affidavit of the plaintiff's agent, that he believed it to be true. He cited 2 *Bur.* 1032.

An affidavit of a debt made before a Burgo-Maſter in *Holland*, is not ſufficient to hold to bail.

Mr.

1787.

Wenſell *againſt* Saunders.

Mr. *Caldbeck*, and Mr. *Curran*, cited 2 *Strange* 1259. 1 *Wils.* 231.

The court at firſt ſeemed ſtrongly inclined to allow the cauſe: but on looking into the caſes, thought them deciſive to the contrary.

Cauſe of bail diſallowed.

Friday. December 7th.

Hamilton *againſt* Johnſon.

HAMILTON againſt JOHNSON.

The court will entertain a bill to be relieved againſt a fraudulent demand though the ſum be under 10*l.* but at any rate the court will not on account of the ſum being trifling, direct the bill to be taken off the file. But the defendant muſt demur to it, or move to have it diſmiſſed.

BILL to be relieved againſt a bond for about 6*l.* The plaintiff obtained a decree upon ſequeſtration, which was enrolled. Motion on behalf of the defendant to take the bill and proceedings off the file, as being for a ſum beneath the dignity of the court, and upon a ſuggeſtion, that the plaintiff being an Attorney, had carried on the ſuit in order to increaſe the coſts.

Power. B. There is no principle to warrant the taking of this bill off the file; where a ſuit is originally commenced in this court to recover a ſum under 10*l.* the defendant may either demur or move to have the bill diſmiſſed, according to the caſe in *Moſely* 356. For the conſtitution has provided inferior courts where ſuch demands are recoverable. But where the object of the bill is to be relieved againſt a fraudulent demand; fraud is the ground of the court's proceeding, and it is no matter how ſmall the ſum is.

Motion refuſed.

SUTOR

1787.
Thurſday, Dec. 13th.
Sutor *againſt* Mitchell & al.'

SUTOR againſt MITCHELL and ANDERSON.

MR. *Caldbeck*, on behalf of the plaintiff, moved for commiſſioners to examine witneſſes now in *England* and *Ireland*, but who were about to return to their reſidence in *Dominica*; the bill having been filed the 7th *July* laſt, and the anſwer not yet come in. It was uſual, he ſaid, in *England*, to examine *de bene eſſe*, where it was apprehended the witneſs is about to leave the kingdom.

In equity cauſes, commiſſions can not go to examine witneſſes *de bene eſſe*, who are about to go abroad, though it might be proper at law.

Yelverton, Ch. Bar. There may be good reaſon for ſuch examination at common law, for otherwiſe a party might loſe the benefit of the evidence at the trial. But it is different in equity, where commiſſions might go to take depoſitions. Here the witneſſes might be examined in chief by commiſſion in *Dominica*, which would be a good exception to the reading of theſe *de bene eſſe* depoſitions, upon the hearing, were we to allow them to be taken.

Motion refuſed.

Same day.

Davis *againſt* Burford.

DAVIS againſt BURFORD.

DEMURRER to a bill ſet aſide on motion of the Prime Serjeant, it not having been ſet down within four days to be argued.

Demurrer not ſet down to be argued, in four days, ſet aſide on motion.

ATHY

1787.

Athy, cuſtodee, *againſt* Skerret.

ATHY, cuſtodee, againſt SKERRET.

A ſubſequent cuſtodee, can not get rid of a former cuſtodiam, by traverſing the inquiſition.

MR. *Curran* moved on behalf of *Burke*, a ſubſequent cuſtodee, for liberty to traverſe the inquiſition, upon the ground that when the firſt inquiſition was had, the defendant had no intereſt in the lands, his father, from whom the eſtate deſcended, having been then alive, and the ſecond inquiſition having been had ſince his death.

Yelverton, Ch. B. A traverſe muſt be by ſome perſon claiming paramount to the title of the crown; whereas *Burke* claims under the crown, as well as the firſt cuſtodee. If *Burke* ſhould be allowed to traverſe the inquiſition, and ſhould ſucceed on the trial, the judgment would be an *amoveas manus domini regis*, which would defeat his own title.

Motion refuſed.

Same day. Callagher, cuſtodee, *againſt* Poe.

CALLAGHER, aſſignee of DRIMGOLD, cuſtodee, againſt POE.

On making abſolute a conditional order for an attachment againſt a tenant for not paying his rent to the cuſtodee, it is neceſſary to produce the order for payment of the rents, and the affidavit of the ſervice of it on him. Tenant ſhewing cauſe, muſt ſtate his term and rent.

THE Prime Serjeant moved to ſet aſide an order allowing cauſe againſt an attachment againſt a tenant for not paying his rent to the cuſtodee, and to make the order for an attachment abſolute. The cauſe, he ſaid, had been allowed in the abſence of the cuſtodee's

counſel.

counſel. The affidavit ſhewing cauſe is defective. It does not ſtate the tenant's term or rent.

1787. Callagher cuſtodee, *againſt* Poe.

Per Cur. That objection is fatal.

Mr. *J. Ball, contra*, inſiſted that in order to make the rule abſolute, the order for the tenants to pay their rents, and the affidavit of its having been ſerved on this tenant, ſhould be produced.

Prime Serjeant. The conditional order recites the order to pay the rents, and could not have been made without that order, and the affidavit of the ſervice of it. The conditional order is therefore *prima facie* evidence that the order was made and ſerved, and it is not pretended to be ſworn that the order was not ſerved.

Per Cur. The order and the affidavit of the ſervice muſt be produced. You come to make abſolute a conditional order for an attachment for not obeying an order; you muſt therefore ſhew that ſuch an order did exiſt, and was ſerved.

Same day. Upton cuſtodee *againſt* Harding. The tenant is to pay his rent to that cuſtodee whoſe order is firſt ſerved on him. He is not to conſider the priority of another's inquiſition. In this caſe the order firſt ſerved was dated prior to the other.

UPTON Cuſtodee, againſt HARDING.

MR. *M. Smith* ſhewed for cauſe againſt attaching a tenant for not paying his rent to the cuſtodee, that on the ſame day on which he was ſerved with the order to pay his rent to *Upton*, he had been about two hours before ſerved with an order to pay *Berry*, another cuſtodee, which order was dated one month before *Upton's* order, and that he has ſince paid all his rent regularly to *Berry*.

1787.

Upton cuſtodee *againſt* Harding.

The Recorder *contra*. The conditional order for an attachment was ſerved the 10th of *October*, and it appears from the tenant's own affidavit, that he made the payment to *Berry* on the 11th, and *Berry* had never obtained a conditional order for an attachment. He ſuggeſted that the conditional order ſtated that *Upton's* inquiſition was prior to *Berry's*.

Mr. *Smith* in reply. The tenant was led to make the payment to *Berry* on the 11th of *October* by *Upton's* own proceeding; for the tenant had been ſerved with a ſimilar conditional order in *December* 1786, and exactly the ſame cauſe was aſſigned as at preſent, but *Upton's* attorney acquieſced, and the motion was not brought on, ſo that the tenant concluded that he was to continue to pay his rent to *Berry*. Even tho' the conditional order ſhould have mentioned the priority of *Upton's* inquiſition, that would not affect the tenant; that was only a queſtion between the cuſtodees.

Yelverton Ch. B. Undoubtedly the priority of the inquiſitions is only a queſtion between the cuſtodees, and not a ground for attaching the tenant. The inquiſition does not attach the rent in his hands. The only thing to affect the tenant is the general order to pay his rent; and whoſever order is firſt ſerved, the tenant muſt pay his rent to him. The leaſe and the injunction to put the cuſtodee into poſſeſſion, are mere form and never executed. Here the tenant has paid his rent to the perſon intitled as to him. There is no ground for attaching him.

Hamilton B. I ſhould not think the tenant juſtified in paying over his rent after the ſervice of

of the conditional order for an attachment, were it not for *Upton's* acquiescing on a former occasion, but I do not think this is a reason for giving him his costs.

1787. Upton custodee, *against* Harding.

Per Cur. Cause allowed without costs.

RUSSEL Custodee, against TEW.

Same day. Russel custodee *against* Tew.

MR. *Huband* moved, that personal interrogatories might be exhibited forthwith to a tenant (on whose behalf he moved) who had been attached for non-payment of his rent to the custodee.

Persons attached in *custodiam* causes, may have personal interrogatories exhibited to them.

The Prime Serjeant observed, that he believed this to be a motion of the first impression; that there had been no instance of interrogatories upon an attachment in a *custodiam* cause, but he saw no reason why they should not be exhibited.

Hamilton B. Attachments are often awarded on omissions in the affidavit to shew cause, and it would be hard to preclude the party from bringing the merits before the court in another way.

Yelverton Ch. B. Interrogatories may as well be exhibited in *custodiam* causes as any other. But it is necessary that time should be given to prepare them; in the mean time we may suspend the day fees.

Per Cur. Suspend the day fees, and let interrogatories be filed by the first day of next term.

1787.

Saturday 15th December.

Taylor cuſtodee *againſt* Odlum.

Deed of annuity, after the *teſte* of an extent, but prior to the inquiſition thereon.

Annuitant cannot diſtrain, for the title of the crown takes place from the *teſte*.

Taylor Cuſtodee, againſt Odlum.

THE Prime Serjeant moved for liberty to diſtrain, on behalf of an annuitant claiming under a deed regiſtered prior to the inquiſition.

Attorney General *contra*. *Taylor* is cuſtodee in truſt for the crown, upon an extent teſted prior to the deed of annuity, and the title of the crown takes place from the *teſte*, tho' the inquſition be ſubſequent to the deed of annuity.

The Prime Serjeant gave up the motion.

Same day.

Graham cuſtodee *againſt* Kennedy.

Head-landlord gets an abſolute order in the firſt inſtance, to diſtrain, &c. others only a conditional rule. So on motion for liberty to traverſe the inquiſition.

Graham, Aſſignee of Lamy Cuſtodee, againſt Kennedy.

PER Cur. A third perſon ſeeking to diſtrain for arrears of an annuity, can only have a conditional order in the firſt inſtance. So of a party moving to traverſe the inquiſition. But a head-landlord, applying for leave to diſtrain or bring an ejectment, is intitled to an abſolute rule in the firſt inſtance. *Caſſan* cuſtodee v. Sir *Roger Palmer*, ſame day.

Johnson

JOHNSON Cuſtodee, againſt Sir JAMES NUGENT.

1787.

Same day. Johnſon cuſtodee *againſt* Nugent. On diſſolving the *cuſtodiam* there is no occaſion for an *amoveas manus*.

THE defendant's eſtate had been veſted in truſtees by act of parliament, for the payment of his debts. Mr. Attorney General, on their behalf, moved for an *amoveas manus*, and an order to diſſolve the *cuſtodiam*.

Per Cur. You may have a conditional order to diſſolve the *cuſtodiam*, for that ſeems to be for the benefit of the cuſtodee; but there is no occaſion for an *amoveas manus*, for where the *cuſtodiam* is diſſolved, the defendant may do what he pleaſes with the rents.

End of Michaelmas Term.

1788.

Hilary Term

28 Geo. III. 1788.

Exchequer Chamber.

Sexton leſſee of Freeman *againſt* Boyle.

In ejectment, plaintiff derives under a leaſe for 99 years, if any of 3 lives ſhall ſo long live, conditioned to be void if the tenant do not within a year after the fall of a life, ſurrender the term abſolutely or upon condition that the ſurrender ſhall be void, if ſurrenderee do not (within three months after the delivery thereof, with the renewal fine, and an en-

JOHN BOYLE, Eſq; Plaintiff in Error, againſt ANDREW SEXTON, Leſſee of EDWARD DEAN FREEMAN, Eſq.

On Monday 28th January 1788, *in this Term, the Court of* Exchequer Chamber, (*the Lord Chancellor aſſiſted by Lord* Earlsfort, *Ch. J. of B. R. and the Right Honourable* Hugh Carleton, *Ch. J. of C. B.*) *affirmed the Judgment of the Court of* Exchequer *in this Caſe. As we deferred inſerting any Report of it,* (*ante* 49.) *until it ſhould have received a Determination acquieſced under, we ſhall here prefix a Statement of it, and the Arguments of the Barons, to thoſe delivered in this Court.*

THIS caſe, of *Sexton* leſſee of *Freeman* againſt *Boyle*, was an ejectment on the title wherein the plaintiff declared on a demiſe made the 4th of *December* 1783, by *Edward Deane*

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

Deane Freeman, executor of *Jane Freeman*, who was executrix of *William Freeman*. It came on to be tried at the ſummer aſſizes 1785, for the county of *Corke*, and came before the court of *Exchequer* upon a demurrer to the evidence given by the plaintiff *Sexton*. That evidence, as ſtated on the record, was, that *Bellingham Boyle* deceaſed, being ſeiſed in fee of the premiſſes, on the 7th of *January* 1739, an indenture of demiſe thereof was executed between him and *William Freeman*. This indenture recited that Lord *Kingſton* deceaſed, did by indenture dated the 14th day of *May* 1669, demiſe the premiſſes unto *John Freeman*, his executors, &c. for the term of 99 years from the 1ſt day of *May* next preceding, provided *John Freeman*, *Edward Freeman*, and *William Freeman*, (children of the ſaid *John* the leſſee) or any of them, ſhould ſo long live; at the yearly rent of 22l. payable half yearly; with a *nomine pœnæ* of 2s. 6d. for every day the rent ſhould remain unpaid after demand. It further recited, that in ſaid leaſe of 1669, was contained a *covenant for a renewal for ever, on the death of every life, the tenant paying 22l. on each renewal, within 12 months after the fall of every life*; and that ſaid leaſe contains many other covenants. It alſo recited that ſaid *John Freeman*, the original leſſee, on the 17th of *September* 1685, aſſigned his eſtate and intereſt in the premiſſes to his ſon *Edward*; and that *Bellingham Boyle* deceaſed, (uncle to the leſſor in this leaſe of 1739) having become by ſeveral meſne aſſignments, &c. ſeiſed of the freehold and inheritance of the premiſſes, did by indented deed of groſſed draft of a ſimilar leaſe for a renewal) execute the ſaid draft. Leſſor covenants to execute it, and that in default thereof, the ſurrender ſhall be void, and the tenant hold for the remainder of ſaid term. Defendant demurs to the plaintiff's evidence, as ſhewing that two of the lives had dropt, without the tenant's performing the condition. The court thought that plaintiff had given evidence from whence the jury might have inferred that the tenant had performed the condition, or that within the year the landlord had waved it; and therefore over-ruled the demurrer.

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

of leaſe, bearing date the 25th of *February* 1717, execute a renewal of ſaid leaſe, unto *Elinor Freeman*, (widow of ſaid *Edward*, and who, as his adminiſtratrix, was in poſſeſſion of the premiſſes, and intitled to ſuch renewal) "*for the like term, rent, duties, and covenants as were contained in the ſaid original leaſe,*" provided *William Freeman* ſenior, his ſon *William Freeman* junior, and *Jane Freeman* daughter of ſaid *Elinor*, or any or either of them ſhould ſo long live. It was further recited that the ſaid *Elinor* ſoon after died, and that by her death and will, her ſaid daughter *Jane*, afterwards the wife of *Robert Barry*, became intitled to ſaid leaſe, and *the benefit of renewals*. The leaſe of 1739, then recites that ſaid *Jane* mortgaged the term to *John Freeman*; who upon her death, on or about the 4th of *July* 1726, preferred his petition, purſuant to the ſtatute †, to the court of Exchequer, ſtating the ſeveral matters before recited, and that *Bellingham Boyle* the elder was dead, and that by his death the reverſion and inheritance of the premiſſes veſted in *Bellingham Boyle* his nephew and heir, a minor; that *Mary Daliel* was his guardian; and praying that ſhe might execute a renewal, inſerting the name of *Richard Freeman*, eldeſt ſon of ſaid *John* the mortgagee, in the place of *Jane Barry* deceaſed. It was recited that ſaid *Mary Daliel* anſwered ſaid petition, and that upon the hearing,

† The Statute alluded to, is 11 *Ann* ch. 3. made to enable guardians and others to renew *leaſes for lives*. It mentions leaſes *for one or more life or lives*; and yet it appears from this recital here, that the Court of *Exchequer* conſidered this leaſe for years determinable with lives, as coming within the ſtatute. Such a leaſe was held to come within the 19 & 20 *Geo.* 3. c. 30. *ante* 135,

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

hearing, a renewal was ordered; and that in purſuance thereof, by indenture dated 8th of July 1727, ſhe as guardian, executed a renewal to the ſaid *John Freeman*, by inſerting the life of ſaid *Richard Freeman*, inſtead of the ſaid *Jane Barry* alias *Freeman*, "*for the like term, rent, duties and covenants as are contained in the original leaſe.*" Then followed a recital that ſaid *William Freeman* ſenior, purchaſed the equity of redemption, and deviſed his intereſt in the premiſſes to his ſon *William Freeman*, (party to this leaſe of 1739) who had paid off the mortgage debt, and obtained a reconveyance. It was then recited, that, by the deceaſe of the ſaid *William Freeman* ſenior, and of the ſaid *Richard Freeman*, two of the *ceſtui-qui-vies* in ſaid renewed leaſe of 1727, there were two lives wanting to be renewed; and that *William Freeman* party thereto, had for that purpoſe nominated and appointed the life of *William Freeman*, fourth ſon of the ſaid *John Freeman*, to be inſerted in the room of the ſaid *William Freeman* ſenior, deceaſed; and the life of *John Baſtable*, ſon of, &c. in the room of the ſaid *Richard Freeman* deceaſed, and had paid unto the ſaid *Bellingham Boyle* (leſſor in this leaſe of 1739) before the execution of thoſe preſents, a fine of 22l. for each of the ſaid lives reſpectively, "*according to the ſaid covenant in the ſaid original leaſe*." After theſe recitals *Bellingham Boyle* in conſideration thereof, demiſes the premiſſes to *William Freeman*, his executors, &c. for the term of 99 years, from the 1ſt of *November* laſt paſt, if the ſaid *William Freeman* (the leſſee), *William Freeman* (fourth ſon of ſaid *John*,) and the ſaid *John Baſtable*, or

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

or any or either of them ſhall ſo long happen to live; at the yearly rent of 22l. with a clauſe of diſtreſs and re-entry, and *nomine pœnæ* as in the original leaſe. Then follows this proviſo. "Provided always, and upon this further and expreſs condition, that if any of the ſaid parties, viz. the ſaid *William Freeman*, party to theſe preſents, the ſaid *William Freeman*, fourth ſon of the ſaid *John Freeman*, and the ſaid *John Baſtable*, ſon of the ſaid *John Baſtable*, ſhall and do happen to die during the term hereby demiſed, and that ſuch other perſon or perſons who ſhall then have the intereſt for the term hereby demiſed and then to come, of and in the premiſſes by ſurvivorſhip, or by any other way, ſhall not within the ſpace of twelve months after the deceaſe of ſuch of them the ſaid *William Freeman*, party to theſe preſents, the ſaid *William Freeman*, ſon of the ſaid *John Freeman*, and the ſaid *John Baſtable*, ſon of the ſaid *John Baſtable*, as ſhall firſt happen to die, by his or their deed or deeds lawfully executed, ſurrender and yield up unto the ſaid *Bellingham Boyle*, and to his heirs, or to ſuch perſon or perſons to whom the next and immediate reverſion or remainder of the ſaid premiſſes, expectant upon the ſaid term and demiſe hereby made, ſhall then reſpectively appertain, all his and their eſtate, term and intereſt hereby granted by virtue of theſe preſents, either abſolutely, or upon condition in the ſaid deed or ſurrender to be contained, to this effect, viz. That if ſuch perſon or perſons, to whom ſuch ſurrender ſhall be ſo made, ſhall not---within the ſpace of three months next after the delivery of ſuch deed of ſurrender, and payment to him

him or them made of the ſum of 22l. ſterling, lawful Engliſh money, and tender made of an engroſſed draft imprinted or otherwiſe, purporting a new leaſe of the premiſes, to be made to ſuch perſon and perſons ſo ſurrendering the ſame, their executors and aſſigns, for the term of 99 years, to begin from the day of the date of the ſaid ſurrender, and to be determinable upon the death of ſuch of them the ſaid *William Freeman*, party to theſe preſents, the ſaid *William Freeman*, ſon of the ſaid *John Freeman*, and ſaid *John Baſtabie*, as ſhall be then living, and the death of ſuch other perſon then living, to be nominated by ſuch party ſurrendering, and in ſuch engroſſed draft to be named, and the death of the longeſt liver of them, with the like reſervations, conditions and covenants as in theſe preſents are contained, *mutatis mutandis*, and with a like condition for a ſurrender, *mutatis mutandis*, as in this preſent proviſo-ſeal, and deliver the ſaid draft, as his, her, or their act or deed, then the ſaid ſurrender to be void, That then theſe preſents and all the eſtate thereby granted ſhall from thenceforth ceaſe and be void. And the ſaid *Bellingham Boyle* doth hereby for himſelf, his heirs and aſſigns, covenant to and with the ſaid *William Freeman* party to theſe preſents, his executors, adminiſtrators and aſſigns, that he and they ſhall and will from time to time on ſuch ſurrender and payment and reſervations aforeſaid, perfect, ſeal, and deliver ſuch deed, in manner as is herein provided, and if he or they ſhall refuſe ſo to do for the ſpace of three months, that then the ſaid deed of ſurrender and every clauſe thereof to be void, and this preſent deed to remain and abide good and firm in the

1788.
Sexton, leſſee of Freeman *againſt* Boyle.

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

the law to the ſaid *William Freeman* party to theſe preſents, his executors and aſſigns for their lives reſpectively, and after their deaths to the executors, adminiſtrators and aſſigns for the remainder of the ſaid term of 99 years herein mentioned and expreſſed, under the ſame yearly payments and reſervations herein likewiſe expreſſed, and that the executors, adminiſtrators and aſſigns of the ſaid *William Freeman* and the ſurvivor of them, ſhall and may quietly and peaceably have, hold and enjoy the ſame, without the lett, trouble, moleſtation or eviction of him the ſaid *Bellingham Boyle*, his heirs or aſſigns, for the remainder of the ſaid term of 99 years, that ſaid ſurrender or any thing in this preſent demiſe contrary thereof in any wiſe notwithſtanding." This leaſe of 1739 appeared to have been regiſtered, and upon it was indorſed a receipt of the ſame date with the leaſe, by *Bellingham Boyle* of 44l. for the two renewal fines. The next piece of evidence was the entry of the leſſee by virtue of that demiſe, and his continuance in poſſeſſion 'till his death in or about 1759. Then the probate of his will appointing *Jane* his wife ſole executrix. The entry of *Jane Freeman*, and her poſſeſſion until the execution of a certain writ of *habere* in the year 1781. Her death on or about the 1ſt day of *November* 1781. The probate of her will, appointing the leſſor of the plaintiff ſole executor. That *William Freeman* (the ſon of *John*) one of the *ceſtui-qui-vies* in the leaſe of 1739, died in 1764, and that *John Baſtable* is ſtill living. That in or about the year 1773, the ſaid *Jane Freeman* did by letter

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

ter addreſſed to the defendant *John Boyle*, the ſon and heir at law of the ſaid *Bellingham Boyle* (leſſor in the leaſe of 1739) who was then dead, "*demand* of the ſaid *John* a renewal of the ſaid leaſe, and tender the rents and fines, &c. then in arrear, the ſum of 400l. having been then due by the repreſentatives of the ſaid *Bellingham Boyle* to the ſaid *Jane Freeman*, as executrix of the ſaid *William Freeman*." That the ſaid *John Boyle* anſwered the ſaid *demand*, by affirming that he would write to *Dublin* for his papers, and on receiving them, would *comply* with the ſaid demand." That all rents and arrears due out of the ſaid premiſſes, were paid to, and accepted by the ſaid *John Boyle*, to and for *Michaelmas* 1773.

To this evidence the defendant demurred, and the plaintiff joined in demurrer.

On the 28th of *November*, 1786, *Yelverton*, Lord Ch. Bar. and *Metge*, Bar. delivered their opinions, for overruling the demurrer. *Hamilton*, Bar. *contra*. *Power*, Bar. was then abſent, but had before expreſſed his opinion for overruling the demurrer.

Metge, Bar. (Having very fully ſtated the record, proceeded): This caſe comes before the court upon this demurrer to the evidence given on the part of the plaintiff. I ſhall firſt conſider the nature of a demurrer to evidence. 2dly. I ſhall point out thoſe facts, which are unqueſtionably admitted by the demurrer, and *prima facie* ſupport the title of the leſſor of the plaintiff; and 3dly. the matters from whence the defence ariſes.

The definition of a demurrer to evidence, I will take from the caſe of *Cockſedge* and *Fanſhaw*, reported in *Douglaſs* 114. There Mr.

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

Mr. *Wood*, of counſel againſt the demurrer, gave a definition, which was ſanctioned by the four judges. Therefore I will ſay, that "a demurrer to evidence admits all matters of fact which a jury *might* find; and only brings the deciſion upon the inference in point of law, from thoſe facts, before the court." I adopt that definition not only becauſe it received the ſanction of the judges, but alſo becauſe he ſupports it by the moſt convincing reaſon, and in very few words; "Were it otherwiſe, ſays he, a party might, in every caſe, take away the trial of the cauſe from the jury, and veſt it in the court." The definition of a demurrer to evidence I have introduced here only for ſake of method. I ſhall have occaſion to recur to it again preſently, and apply the doctrine.

Secondly, as to the facts which are incontrovertably admitted by the demurrer, and make out a *prima facie* title in the leſſor of the plaintiff—Theſe are the ſeiſin in fee of the lands in the declaration, in *Bellingham Boyle* in 1739. The demiſe of them in that year to *William Freeman*, for 99 years, determinable on the death of the longeſt liver of three lives. The poſſeſſion in the tenant continued down to the year 1781, when *Jane Freeman* was diſpoſſeſſed under an execution of an *habere*. One of thoſe lives ſtill in being. The right to the benefit of the leaſe, veſted in the leſſor of the plaintiff. There is immediate and direct evidence of theſe facts. It therefore neceſſarily follows, on the demurrer to evidence, that the plaintiff hath maintained the iſſue *prima facie*.

The

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

The third conſideration is, whence does the defence ariſe? It muſt neceſſarily ariſe out of ſome part of the evidence given by the plaintiff. It ariſes out of the leaſe itſelf. It was contended, in ſupport of the demurrer, that there was a breach of the condition, (which I have recited *verbatim*,) and conſequently a forfeiture of the leaſe; in as much as there was not any, or not ſufficient evidence given, of an actual ſurrender by deed, either abſolute or conditional, in purſuance of the condition, within twelve months (or at all) after the death of either of the *ceſtui qui vies*, though one of them, it is proved, died in 1759, and another in 1764. To this objection, ſeveral anſwers have been offered by the counſel for the plaintiff. They have argued, that the condition is repugnant to the grant, and therefore void. That, ſuppoſing it is not void, there was evidence ſufficient to ſhew a waver of the forfeiture. That the acts of the leſſor amount to a confirmation of the grant, or to a new grant. Other gentlemen contend, that there is evidence to go to a jury, of a performance of the condition, that is, of a ſurrender, or of what amounts thereto, namely, a waver of the condition before a breach. And it has been further ſaid, that there is a *prima facie* title in the leſſor of the plaintiff; that the defendant has not given any evidence of a breach, and that the court cannot preſume one.

As I found my opinion on the ground, that there was evidence to go to a jury of a performance of the condition, or of what muſt be conſidered as tantamount thereto, *i. e.* a waver antecedent to the breach of the condition;

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

on; I do not think myſelf bound to give a decided opinion upon thoſe other points. However I will mention what is the inclination of my mind, with reſpect to each of them: Firſt, as to the objection to the condition, of its being void for repugnancy. The term demiſed, is for 99 years, determinable on the fall of three lives; and the condition being by the ſame indenture, the words of it are the words of both parties, and it makes part of the evidence, upon which the plaintiff reſts his title. The agreement is, that the leſſee ſhall, within a certain time after the fall of a life, make an abſolute, or a conditional ſurrender; and if the leſſor ſhall accept the ſame, he ſhall, on payment of a fine, execute a new leaſe of 99 years, determinable on three lives, one life to be inſerted in the ſtead of the life fallen; or if the leſſor ſhall, for three months, refuſe to accept it, the ſurrender to be void, and the leſſee to hold for the reſidue of the original term of 99 years. A ſurrender may be made upon a condition precedent or ſubſequent. This is laid down in *Sheppard's Touch*, 307. But he takes a diſtinction between eſtates for life, and terms for years; in the caſe of the former, the ſurrender muſt be by deed; in the latter, he doubts whether it muſt be by deed, or may be without deed. Here the acts to be done by the tenant, are in his own power, and therefore the performance of the condition is not impoſſible; neither does it tend to annul, or to abridge the original grant; for if the leſſor accept the ſurrender, he is to execute a new leaſe, which will be an extenſion of the term: but if he refuſe to accept the ſurrender, the tenant holds for the reſidue of the

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

the original term, and the ſurrender becomes void. A queſtion has been made: What intereſt remains in the leſſee during the three months after the ſurrender, the time allowed to the leſſor, either to accept or to refuſe? To this I anſwer: He holds under the old leaſe. The ſurrender is not compleat, until it is accepted, *Shep. Touch*, 307. Here the leſſor cannot accept the ſurrender, otherwiſe than by the execution of a new leaſe; and if he refuſe for three months, the ſurrender is void, and the tenant is to hold under the original leaſe; ſo that the terms of the condition, preciſely follow that doctrine; the ſurrender being conditional. This condition, therefore, not appearing to me to be impoſſible, or contrary to the eſſence or nature of the leaſe; and the performance on the part of the leſſee, not tending to annul or to abridge the leaſe; nor being either *malum prohibitum*, or *malum in ſe*, I think the court is to expound it, ſo as to carry the intention of the parties into execution; as in all caſes where ſuch expoſition does not militate againſt any eſtabliſhed principle of law; and here the condition tending to create an eſtate, and not by poſſibility to deſtroy it, is to be performed as near as may be to the condition, and the intention of the parties; according to *Co. Lit.* 219.

2dly. Suppoſing the condition not void for repugnancy. Is there evidence of a waver of the forfeiture? This being a term for years, to which the condition is annexed: the breach of it makes the leaſe abſolutely void. Were the condition annexed to a freehold, the breach would not make the leaſe void; but only voidable. An entry would be neceſſary to

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

take advantage of it. This is laid down in *Co. Lit.* 214, where the reaſon of the diſtinction is given, viz. "that a leaſe for years may begin without ceremony, and ſo may end without ceremony; but an eſtate of freehold cannot begin or end without ceremony." This diſtinction, if well attended to, will reconcile ſome authorities, which have been cited out of *Cowper* and other books, as to a waver of a forfeiture, and as to the doctrine of confirmation. The principle I go upon, is, that where a forfeiture is *compleat*, there can be no waver of it. The caſes I have mentioned of a term for years, and a freehold, will ſerve to illuſtrate this. Where a condition is annexed to the former, upon the breach of which the leaſe is to become void, when the breach happens, it works a forfeiture *eo inſtante*. The forfeiture is then compleat, without entry, and there can be no waver. But where the condition is annexed to a freehold; (in which caſe an entry is neceſſary, in order to take advantage of the breach,) there may be a waver after the breach and before entry; for until an entry be made, the forfeiture is not compleat. The caſe of *Goodright*, leſſee of *Walter*, v. *Davids*. *Cowp.* 803, when well conſidered, will be found to turn upon this diſtinction that I have taken. It was the caſe of a leaſe for 21 years, with a covenant on the part of leſſee, not to underlet without the conſent of the leſſor, with a power of re-entry in caſe of a breach. There re-entry was neceſſary to compleat the forfeiture. The leſſee underlet, without the conſent of the leſſor, who nevertheleſs, knowing of ſuch underletings, received rent from his leſſee. Lord *Mansfield* ſays there, "to conſtrue

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

ſtrue this acceptance of rent, due ſince the condition broken, a waver of the forfeiture, is to conſtrue it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it." Now does this militate againſt the principle I have laid down? The leaſe was not void till entry: an act was neceſſary to be done by the landlord, to compleat the forfeiture: it was not compleat till he had entered. The determination in that caſe by Lord *Mansfield*, does not go one *iota* beyond the doctrine in *Co. Lit.* 211.

Having eſtabliſhed, that the forfeiture ariſing upon the breach of a condition annexed to a term for years cannot be waved after the breach; I think, it follows, that ſuch a leaſe having become abſolutely void by the breach, cannot be afterwards confirmed. That what is void may yet be confirmed, cannot be ſupported without deſtroying the diſtinction between void and voidable. The counſel for the plaintiff, ſaw this, and therefore followed the example of the counſel in *England*, in a caſe which was cited, (*Doug.* 52.) and combated the diſtinction between void and voidable, arguing that it was founded on miſtaken reaſoning. But as that diſtinction (which is laid down in *Pennant's* caſe, 3 *Co.*) has held from *Coke's* days to the preſent; and it is decided in the caſe of *Goodright* v. *Humphrys*, reported in a note in *Doug.* in leſſee of *Simpſon* v. *Butcher*; and even in that very caſe of leſſee of *Simpſon* v. *Butcher*, Lord *Mansfield* ſays—That there can be no confirmation of a thing abſolutely void; I ſhall not dwell longer on this

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

part of the caſe. In the caſe laſt cited, Lord *Mansfield* makes a diſtinction: he ſays there could be no confirmation of a thing abſolutely void; but that the acts of the leſſor might operate as a new grant. The counſel here have endeavoured to avail themſelves of this diſtinction. The only caſe that was cited in ſupport of it, is that of *Goodright*, leſſee of *Carter* v. *Straphan*, *Cowp.* 201. See whether that caſe can at all be applied to the preſent. A mortgage, in form of a leaſe, was made of a *feme covert's* eſtate, by the huſband and wife. After the huſband's death, the deed being in the poſſeſſion of the mortgagee, the widow directs the tenants to attorn to him; ſettles with him for the rents, ſtiling him mortgagee; and did not queſtion his poſſeſſion for many years. The mortgage was held abſolutely void on the death of the huſband; but it was held that the acts of the widow amounted to a re-delivery, (the deed being in the hands of the mortgagee, and the original delivery by her being void;) on the authority of *Co. Lit.* 36, "as a deed may be delivered without words, ſo may it be delivered by words, without any act of delivery;" and of *Perkins. ſect.* 154, "If the firſt delivery take any effect, the ſecond delivery is void. But if a married woman deliver a bond or other writing as her deed, this delivery is merely void, and therefore if after the death of her huſband, ſhe, being ſole, deliver the ſame deed again as her deed, the ſecond delivery is good and effectual." I now proceed to conſider the laſt ground upon which the counſel for the plaintiff have replied to the defence ſet up by the defendant, and to which Mr. *Wolfe* has almoſt entirely confined

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

fined his argument. He contended that there was evidence to go to a jury, either of a waver of the condition, before it was broken; or of a performance, that is, that there was a ſurrender made by the tenant in purſuance of it. And it is on theſe grounds I found my judgment. That there may be a waver after a breach, where entry is neceſſary to take advantage of it, cannot be denied; *Co. Lit.* 211. *b.* is direct to the point. "If the condition be broken for non-payment of rent, yet if the feoffor bring an aſſize for the rent due at that time, he ſhall never enter for the condition broken, becauſe he affirmeth the rent to have a continuance, and thereby waveth the condition." Another caſe there, is, "if the feoffor accept a rent due at a day after, he ſhall not enter for the condition broken, becauſe he thereby affirmeth the leaſe to have a continuance." But there entry was neceſſary to take advantage of the breach; for if the forfeiture had been compleat, there could be no waver of it. In the preſent caſe, entry not being neceſſary to compleat the forfeiture, (the condition being annexed to a term for years,) the evidence muſt go to a waver antecedent to the breach, and it will be neceſſary in this part of the caſe, to attend cloſely to the nature of a demurrer to evidence. It admits all matters of fact, which the jury might find; not only the matters given in evidence, but alſo thoſe which a jury might infer from them. In *Cockſedge* and *Fanſhaw*, the queſtion was, whether freemen factors had a right to take to their own uſe, the farthing duty on corn conſigned to them; and that depended on the queſtion of uſage or cuſtom. Lord *Mansfield's* words are, "What

1783.

Sexton, leſſee of Freeman, *againſt* Boyle.

"What is brought before the court on this demurrer? not a queſtion, whether the evidence was ſufficient to ſatisfy the jury of the fact of the cuſtom; for by the demurrer, the defendant admits every fact which the jury *could* have found upon the evidence." Thoſe of J. *Aſhurſt* are, "There was ſufficient to be left to a jury, and that is all that is requiſite." J. *Buller's* are, "It is the province of the jury alone, to judge of the truth of facts, and the credibility of witneſſes, and the party cannot, by a demurrer to evidence, take that province from them, and draw it *ad aliud examen*." So that in this caſe, if there was any evidence to go to a jury of a performance of the condition by the leſſee, or of a waver of it by the landlord before a breach, I am warranted to ſay that this demurrer muſt be overruled. One gentleman, (Mr. *Frankland*) has very ingeniouſly illuſtrated this caſe, by ſuppoſing this evidence and demurrer, not to have been on the trial of an ejectment, but of an iſſue to try whether the leſſee had performed the condition; or whether the landlord had waved it before a breach. I ſay, that in ſuch a caſe, if the evidence here were ſufficient to go to a jury, of thoſe facts, the demurrer ought to be overruled. But was not the continued uninterrupted poſſeſſion, from the year 1759, down to the year 1781, (20 years after the firſt *ceſtui qui vie* died, and 17 after the death of the ſecond; upon the death of each of whom, a forfeiture might have incurred)—I ſay, was not this continued poſſeſſion, evidence to go to a jury, to ſhew that the *leſſee* had tendered a ſurrender by deed, and an engroſſed draft for the execution of a new leaſe, purſuant to the terms of

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

of the proviſo? But if this abſtractedly taken, be evidence of it, how much ſtronger is it, if we conſider the terms of the covenant; that it was optional in the leſſor, whether he would accept the conditional ſurrender, and if he did not, the tenant was to hold under the original leaſe. The tenant has held agreeably, either to a refuſal by the landlord to renew, or to his agreement to accept the ſurrender. Since the leſſor had not, for ſo long a time, taken ſteps to avail himſelf of a forfeiture; is not this evidence to go to a jury, that there had not been any forfeiture? that is, that there had been a ſurrender in due time, or a waver of it? But what if it can be ſhewn, that the tenant held under the original leaſe after the fall of the two lives; was not that evidence to go to a jury, of a performance of the condition? I ſay there was ſuch evidence. The evidence of this was, that the rent and all arrears thereof, were actually paid to and accepted by the defendant, to *Michaelmas* 1773; and I muſt preſume that that was the rent reſerved under the leaſe. This at leaſt was evidence to go to a jury, that he held under that leaſe, (for would they not have been warranted to infer that the rent paid was the rent reſerved in the leaſe of 1739?) and conſequently is it not evidence of a continuance of it; which excludes all idea of forfeiture. Is there not alſo evidence, to go to a jury, that renewal fines were accepted after the ſuppoſed breach of the condition? There is direct evidence to this effect. In 1773, *Jane Freeman* by letter demanded of the defendant, the ſon and heir of *Bellingham Boyle*, a renewal, and tendered the rents and fines then in arrear, 400*l.* being due by the

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

the repreſentatives of *Bellingham Boyle*, to her as executrix of *William Freeman*. He anſwered "that he would write to *Dublin* for his papers, and on receiving them would comply with her demand." He does not make any objection. He does not ſay to the tenant, "I will not renew, for your leaſe has become void." On the contrary he makes a peremptory promiſe to renew. Is there not evidence to go to a jury that he retained the 400*l.* in his hands for renewal fines? If he were ſatisfied to take the fines, and to execute a renewal, is not that ſtrong evidence to ſhew that he conſidered that there had not been any breach of the condition, and is it not ſome evidence that the leſſee in 1759, and in 1764, had performed the requiſites? Conſider that twenty five years had elapſed from the fall of the firſt life, to the ejectment, and twenty years from the fall of the ſecond, and therefore difficult to adduce more direct evidence of a ſurrender. The deed of ſurrender itſelf, muſt have remained in the poſſeſſion of the landlord, and the leſſee might have tendered it, when no witneſs was preſent. All this evidence is alſo made uſe of, to ſhew that before the breach, the condition had been waved: and ſome part of it, when ſo applied, would have aid from other circumſtances. There was no condition in the original grant, or in the two former renewals; this extraordinary clauſe is firſt introduced in the leaſe executed in 1739. The object of it was, that the leſſor might be appriſed of the fall of each life, for the ſake of the fines, and being ſafe in that reſpect, he might wave the condition.

If

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

If theſe facts, ſeparately or collectively, amount to any evidence to go to a jury, of either a performance or waver, this demurrer cannot be ſupported. But it has been ſaid, that defendant's letter containing a promiſe to renew is not an execution. This I admit; but if there is evidence either of a performance or a waver of the condition, plaintiff is intitled to recover without a renewal, one of the lives in the leaſe of 1739 being in *eſſe*, and this letter is applied as ſuch evidence. It was objected that the old leaſe itſelf was given in evidence, by the plaintiff. To this I anſwer: It ſupports the title, ſuppoſing that the tenant was not guilty of a breach, or that there was a waver; one of the lives in that leaſe being alive.

The queſtion ultimately comes to this,---ſuppoſing that inſtead of demurring to this evidence, the counſel for the defendant had urged the judge who tried the cauſe, to call the plaintiff--- whether the judge would have been juſtifiable in taking upon him to reject this evidence, as altogether inapplicable to ſupport the title, upon this iſſue, or ought to have told jury. "Here is a *prima facie* title in the plaintiff; but then, there is a condition annexed to the leaſe, which if not performed or waved, annuls it; therefore, to find for the plaintiff, you muſt be ſatisfied either that the tenant did within twelve months after the fall of each life make a conditional ſurrender, and tender the fine and an ingroſſed draft for a new leaſe, or that, within that time, the landlord had waved that ceremony. But if you are of opinion that the tenant has not done what he could in performance

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

formance of the condition, and that the leſſor had not waved the formal ſurrender, you are to find for the defendant? In my opinion, if he had not let the evidence go to the jury in this manner; but had nonſuited the plaintiff, he would have acted inconſiſtently with his duty as a judge: and I do think that in allowing this demurrer, we would act directly in contradiction to the doctrine of ſuch demurrers laid down in *Douglaſs*.

Note, Baron *Metge* in ſtating the evidence, obſerved that *Jane Freeman's* being put out of poſſeſſion in 1781 by an *Habere*, was a ſingle naked fact, unaccompanied by any circumſtances, from whence any inference as to evidence could be drawn; that none had been attempted by the counſel; that it did not appear, who was leſſor of the plaintiff in that ejectment; or on what ground it had been brought; that it might have been for non-payment of rent; that therefore he would take no further notice of that piece of evidence.

Baron Hamilton. I deliver my opinion on this demurrer with great diffidence, as I muſt upon all occaſions, where I am ſo unfortunate, as to differ from my learned brethren. But it is my duty to deliver my opinion, be that what it may.

From the matters appearing on this record, the plaintiff attempts to ſupport his title on three grounds. The firſt is, that the proviſo or condition is repugnant and inſenſible, and therefore void; and conſequently, one life being ſtill in being, the leſſor of the plaintiff has a right to recover, under the leaſe executed in 1739. But I ſee no ſuch grounds for impeaching

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

impeaching this condition. It had a reaſonable object. It was for a convenient and proper purpoſe. The meaning of it in effect was this---- The landlord ſays to the tenant, "you ſhall have a renewal, but it ſhall be upon particular terms; you ſhall always hold, if at all, under a leaſe ſimilar to the preſent, and therefore you ſhall either ſurrender abſolutely, or, if you deſire a renewal, you ſhall do ſome act on your part; you ſhall ſurrender conditionally, within twelve months after the fall of a life; and tender an ingroſſed draft of a leaſe of a ſimilar import with the preſent, together with a renewal fine of 22l." There is nothing in this unreaſonable or repugnant; therefore I think we may diſcharge the caſe of the objections to this proviſo, on the ground of its being unreaſonable, repugnant and void. I have only to obſerve, that I think ſuch a condition in a deed, a proper ſubject of a demurrer to evidence, in order to bring the queſtion on the import of it before the court. Some of the books ſay that where *viva voce* evidence only is offered, the party ſhall not be compelled to join in a demurrer to ſuch evidence.

I now proceed to conſider the nature of a demurrer to evidence. In that caſe in *Douglaſs's* reports, Lord *Mansfield* ſays, "it admits every fact, which the jury *could* have found from the evidence." *Buller* J. ſays, "*might* have found." I agree to this definition of a demurrer to evidence: but then it muſt have a reaſonable interpretation. It cannot be ſaid that a demurrer to evidence admits facts which the evidence was not offered to prove, or thoſe which it has a tendency to diſprove.

I now

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

I now go to the other two grounds upon which the plaintiff relies. The ſecond is, that from the evidence it appears that the benefit of the forfeiture was relinquiſhed and the leaſe confirmed. I freely acknowledge, that if this were a caſe, where the leaſe was capable of confirmation, there is abundance of evidence, that would amount in law to a confirmation of it. But there is nothing better known, than that a term for years may begin and end without ceremony; that the words "to ceaſe and become void" have efficacy to determine ſuch a leaſe *inſtanter*, upon the condition being broken; and that it cannot be confirmed or reſtored by any acts, ſuch as appear or are contended for in the preſent caſe. This matter is well diſcuſſed in *Douglaſs* 50. As to what has been ſaid, of acts amounting to a redelivery; the caſe in *Cowper* on that point is materially different from the preſent. There the delivery of the deed of demiſe, being a mortgage, was abſolutely void, as againſt the wife; and therefore it was capable of a redelivery. But here there is no objection to to the capacity of the parties. The deed has had its operation; has become *functum officio:* and to ſet it up again, would be reſtoring it, in all its parts and with all its defects.

The great principle and ruling conſideration determining my opinion, is, that a demurrer to evidence admits every thing the evidence was adduced to prove; if ſuch might be inferred or found from it; but not facts, which it was not adduced to prove, or which it has a tendency to diſprove. In my judgment, it

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

it is here the fallacy lies; all the evidence was adduced or offered to ſupport the leaſe on the ground that the forfeiture had been waved, and the leaſe confirmed. The evidence ſpent itſelf intirely in that way, or on that ground; and it appears to me, that the ingenious application of it now contended for, was an after thought taken up by counſel.

The third ground is, that evidence was given from whence the jury could or might have inferred, that the terms of the condition had been complied with, that is, that the tenant had tendered a deed of conditional ſurrender within twelve months after the fall of each life, and had tendered an engroſſed draft of a leaſe, of a ſimilar import, together with the renewal fine; but that the landlord had refuſed to renew, and therefore the term had become abſolute for the reſidue of the 99 years. Or they might have found and inferred, it is ſaid, that the landlord had prevented the tenant from complying with the terms of the condition. Let us conſider the two different propoſitions. Firſt it is ſaid, that by various acts on the part of the landlord, the benefit of a forfeiture had been waved. Does not that admit and neceſſarily import, that the condition had been broken? The ſecond is, that the condition had been performed, which is directly contrary to the former; and yet it is contended that this evidence would ſupport theſe contradictory propoſitions. The firſt piece of evidence was the leaſe of 1739, reciting the former renewals, and the circumſtances under which they were made. The renewal in this leaſe is not exactly ſimilar to the former. It appears indeed from

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

from them, that the condition had never been ſtrictly complied with. Nay, that very renewal in 1739 being made after the fall of *two lives*, ſhews that it had not been complied with. But is that any evidence to ſhew that the ſubſequent breaches were diſpenſed with? Another piece of evidence was that *Jane Freeman*, the leſſee, continued in poſſeſſion, until the execution of an *Habere* in 1781. This is a fact not very favourable to the title of the leſſor of the plaintiff. How is the effect of this to be done away? It is ſaid that it does not appear who was the leſſor of the plaintiff in that ejectment; that it might have been for non-payment of rent. But I ſay, it follows from what appears on this record, that the defendant here was the leſſor of the plaintiff in that ejectment. For this ejectment ſhews him to be now in poſſeſſion of the lands. But what makes it ſtronger, is, that on this record the title to the inheritance and to the term, for a great way back, is ſet out; ſo that it could not by any reaſonable intendment be preſumed there was any other claimant of theſe lands; but then the deed executed by defendant's father is given in evidence, which could not be, if the plaintiff had been evicted by a ſtranger. But adly, if it had been for non-payment of rent, the intereſt in the leaſe muſt by this time have been gone. And ſuppoſe the tenant had been evicted by ejectment for non-payment of rent; is not the poſſeſſion, upon payment, to be recovered by another ejectment? But this is not brought upon that ground.

The next piece of evidence is, that one of the *ceſtui qui vies* in the old leaſe of 1739, is

1788.
Sexton, leſſee of Freeman, *againſt* Boyle.

is ſtill living. Now what comes here out of the mouth of the plaintiff himſelf? I do not claim, ſays he, by virtue of a renewal, or on the ground of the term having become abſolute for the reſidue of the 99 years, by a performance of the condition on my part; but under the old leaſe.

The next piece of evidence, is the application made by *Jane Freeman*, to the defendant in 1773. Take notice, here was a tender of the *fines*, (in the plural number) ſo that neither the fine due on the fall of one of the lives in 1759; nor that on the fall of another in 1764 had been paid. Are we to infer from this piece of evidence, that the fines had been tendered before? no! the contrary is to be inferred. There is further ſtrong evidence, from the proofs on the part of the plaintiff, that no legal tender was made. The letter ſays, "the ſum of 400*l.* being due from the repreſentatives of *Bellingham Boyle*, to her as executrix of *William Freeman*." This ſhews that it was a debt due, and had been ſo all along, by *Bellingham Boyle* to *William Freeman*; and therefore ſtrong preſumptive proof that no particular tender was made within the time. This might be a very good ground to go upon in a Court of Equity; and the anſwer refers to that very claim, and to that only; but that was not what, in a court of law, we can ſay is a legal tender. The laſt piece of evidence is the payment of all rents and arrears to the defendant, to and for *Michaelmas* 1773. If I am right in my opinion, as to the *Habere* executed in 1781; it intirely takes away any weight that this piece of evidence might otherwiſe have; but independently of that matter; although

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

although the acceptance of rents would have confirmed the leaſe, were it an intereſt capable of being ſet up; yet here the leaſe had become abſolutely void, and was incapable of confirmation. Therefore, what has been ſaid on the ground of confirmation, though it might have done very well in a court of equity, is not of any weight in a court of law.

Upon the whole, I am of opinion, that the evidence can only be applied to ſhew, that by various acts on the part of the defendant, he meant to confirm the leaſe, and not to take advantage of a breach of the condition. But that will not do in a court of law. I therefore think, that the judge at the trial, would have been well warranted in non-ſuiting the plaintiff; for he might ſay to him, admitting all the matters which you have given in evidence to be true, yet the law is againſt you.

Yelverton, Ch. B. This is a demurrer to the evidence offered by the leſſor of the plaintiff, in an action of ejectment. If the leaſe proved on the trial by the plaintiff, were a common leaſe for 99 years, if any one of three lives ſhould live ſo long, with an ordinary covenant for renewal, his title would be unqueſtionable, one of the lives being ſtill in being. But it is contended, for the defendant, that in the leaſe is contained a condition, which makes it void, on the leſſee's not performing certain acts on the fall of each life. To this the plaintiff anſwers, that the condition is repugnant, inſenſible, and impracticable; yet if it be a practicable condition, that there was ſufficient evidence to go to the jury, that the leſſee performed it; or if not, that the leſſor himſelf hindered him; and it is clear law, that

if

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

if a landlord prevent a covenant from being performed, he cannot take advantage of the non-performance, *Co. Lit.* 206, *Doug.* 659, where this doctrine is well laid down and expounded. I do not ſay that it appears that the evidence was given *eo intuitu*, nor do I think it neceſſary it ſhould. My brother *Hamilton* ſays, that if it does not appear that the evidence was given *eo intuitu*, it cannot be taken that it was; but I cannot agree with him, for in an action for money had and received, or in an ejectment on the title, where the caſe is not ſtated in the pleadings, it can never appear on the record *quo intuitu* the evidence was given; but in every other action it does, becauſe the caſe is ſtated in the pleadings. This was extremely well illuſtrated by Mr. *Frankland*, by recurring to the antient form of pleading in ejectment before it was reduced to its preſent conciſe fictitious form. Formerly, if this ejectment had been brought, plaintiff muſt have declared on his title by the leaſe. Defendant would have pleaded, that there was a condition in the leaſe, and that it had been broken. Plaintiff might have replied, that he performed it, or that defendant hindered him. Iſſue might have been joined on either fact, and then it would have appeared *quo intuitu* the evidence was offered. But in the preſent form of ejectment, where the title is not ſet out in the pleadings and drawn to iſſue on a particular fact, and in an action for money had and received, this cannot be the caſe. I am therefore warranted in ſaying, that in ſuch actions we are to take it that the evidence goes to every thing that the plaintiff ſeeks by his action. Let us conſider this condition.

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

The ſubſtance of it is, that on the fall of any of the three lives, the tenant is within twelve months after to ſurrender his leaſe, but at his option, whether abſolutely, or on condition that if it be not accepted and a renewal executed, the ſurrender ſhall be void, and the leaſe ſtand. I will not ſay that the condition is inſenſible or repugnant: there is no occaſion, being of the opinion that I am on other grounds: but I will ſay that it requires no common degree of ingenuity to make it out, and conſtrue it into a ſenſe that is rational and practicable. I have ſtated what may be the conſtruction, but it may bear another, namely, that by the ſurrender the leaſe ſhall be void, and out of its aſhes ſpring a new one; for in default of the renewal by the landlord, the leſſee is to hold to the death of the longeſt liver of the three lives, and thence for the reſidue of the 99 years. The tenant's intereſt becomes abſolute for the reſidue of the term, and is no longer determinable, as before, on the fall of the three lives; ſo that it will not be the old leaſe, but a new one ſpringing out of its aſhes. I ſhall not ſay what the conſtruction ought to be: but one thing appears clearly on the record; That the parties themſelves felt a difficulty how to conſtrue the condition, and conſidered it, and ſo did the court of *Exchequer*, (upon a petition preferred to them under the act for renewing leaſes, where the landlord is a minor,) as an ordinary covenant for renewal. The leaſe executed in 1739, contains a recital of the old leaſe of 1669, for 99 years, determinable on the fall of three lives, with a covenant for renewal for ever in the ordinary way. That being by indenture, and the words

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

words and act of both parties, is evidence againſt them, what conſtruction they put on it. But it is ſtill ſtronger; for the leaſe recites the renewal in 1717, without any previous ſurrender; and another in 1727, by order of this court, under the ſtatute, without any ſurrender, and in the ordinary way; ſo that the ſurrender does not appear to have been conſidered neceſſary to the renewal, nor the omiſſion a forfeiture, from the making of the original leaſe in 1669, down to the day of the trial. I do not mean to ſay that theſe recitals would prevent an avoidance of the leaſe of 1739 by an omiſſion of the ſurrender, or ſet it up if avoided: but what defendant ſaw his anceſtors had done before him, it is natural he ſhould be inclined to do alſo; and theſe recitals are ſtrong to ſhew that they had not inſiſted on a ſurrender; but that the landlord ſaid to the tenant, you need not ſurrender, I will renew without that ceremony. Then after preventing the tenant from performing the condition, ſhall he be allowed to take advantage of the non-performance? Coupling the evidence of the leaſe of 1739 with the acts of the defendant, it is impoſſible to ſay what effect they would have had upon the jury. My brother *Metge* ſtates the evidence to have one tendency. My brother *Hamilton* ſtates it to have another, and both have argued upon it: but are they the jury? are they to conſider upon it? That is the proper province of the jury. They both debate and apply the evidence; yet my brother *Hamilton* ſays the jury ought not to conſider or debate it. He ſays the evidence goes to the old leaſe, which is void, and muſt be conſidered as ſpent on that, which

1788.

Sexton, leſſee of Freeman, *againſt* Boyle.

ean give no title to the plaintiff. My brother *Metge* conſiders it as applied to that, which does give title to the plaintiff. I agree with my brother *Metge*. Is it proper for the court to apply evidence, which does not apply itſelf, to deſtroy the plaintiff's title? If it does not apply itſelf, the court ſhould apply it to that, which will make a title in the leſſor of the plaintiff, elſe we muſt ſuppoſe that the plaintiff gave evidence, which would damn his own title. It is neceſſary for the plaintiff to make out the title of his leſſor, I will therefore ſuppoſe the evidence was brought with that aſpect.

The evidence was, that *William Freeman*, one of the *ceſtui que vies* died in 1759; that in 1764 another died; but, that a ſurrender was made within twelve months, or that any was offered and prevented by the landlord, does not expreſsly appear. But though it is not expreſsly ſtated, the demurrer to evidence does in law, not only admit all the facts ſtated, but admits alſo every concluſion of fact to be inferred from them. The next evidence is that from 1759 to 1781, when *Jane Freeman* was diſpoſſeſſed under the execution of an *Habere*, the tenant was ſuffered to continue in poſſeſſion as ſuch, and the rents and arrears due out of the lands on the foot of the leaſe, were paid to and accepted by the defendant, until *Michaelmas* 1773. About that time the tenant by letter to the defendant, demanded a renewal, and tendered the fines due, 400*l.* being then due by the repreſentatives of *Bellingham Boyle*, to her as executrix of *William Freeman*. The defendant anſwered that he would comply as ſoon as he could get his papers, which he had not

1788.

Sexton, leſſee of Freeman, *againſt* Boyle,

not then with him. It is ſaid that this is not a tender; at moſt, that it is only an argumentative one, and that it does not appear that the defendant was the perſonal repreſentative of *Bellingham Boyle*. But he was his heir, and as ſuch might have been charged with the debt. I have a right to take it ſo, and that he was contented to take a diſcharge thereof inſtead of the rents and fines. I may then take it, that there was a tender. At all events was there not evidence to be left to a jury, to ſhew that the ſurrender had been made or waved? If theſe facts will not bear this concluſion, that is, if a jury might not draw this inference from them, they are no evidence at all; they were inadmiſſible, and ought not to have gone to the jury; and if there had not been a demurrer, the plaintiff ought to have been nonſuited. My brother *Hamilton* ſays, he would have nonſuited the plaintiff, that is, he would not have let the jury conſider and apply the evidence to ſubſtantiate the plaintiff's title, becauſe he conſidered it differently, and had applied it to that which would give him no title at all. This, I confeſs, would require an uncommon degree of courage. If defendant did not conſider himſelf bound to renew, why did he offer it? Is not that evidence to go to the jury, that he did conſider himſelf bound? What was to induce the obligation? The performance of the condition by the tenant. Did he object to the want of a ſurrender? no. From the time of the fall of the life in 1759, when the forfeiture might have been incurred, to 1773, the tenant continued in poſſeſſion, and the landlord received the rent. Is not that evidence for a jury, that the condition was performed?

On

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

On this evidence, if I had been the judge before whom the action was tried, I ſhould have told the jury, "If you think the condition was not performed, the leaſe is void, and you muſt find for the defendant. If you think it was, you ſhould find for the plaintiff." I ſhould not have thought myſelf warranted in ſtopping the evidence from going to the jury, by nonſuiting the plaintiff. The judgment muſt therefore be that there was ſufficient evidence to go to the jury to ſupport the iſſue on the part of the plaintiff. This is the opinion I have at preſent formed. In the argument of this caſe, a difficulty occurred to me. I conſidered that when a fact is attempted to be proved by probability and preſumption; and there is a demurrer to evidence; the party offering the evidence ought to call on the other to admit it, before he joins in the demurrer; which not having been done here, there ought to have been a *Venire facias de novo:* but I have yielded to the opinion of my brethren, and have been helped out of the difficulty by the definition of a demurrer to evidence in the caſe in *Douglaſs*. If I am wrong, the novelty of the caſe will induce a writ of error, whereupon the miſtake may be rectified, and I ſhall rejoice in it, on my own account, and for the ſake of the public.

In Trinity term 1786, *Baron* Power *apprehending he ſhould be abſent when his brethren ſhould give their opinions, delivered his. We were not then preſent, but have ſince been favoured with it.*

Power B. If the ſeveral queſtions made at bar, were now to be determined, this caſe would require great conſideration: it would then

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

then be a caſe of difficulty; but the real point once diſcovered, all the difficulty, I conceive, muſt vaniſh. The defendant's defence at law was reduced to this; the breach of a condition in the leaſe of 1739, on the part of the tenant---the forfeiture and nullity of that leaſe in conſequence of that breach. But if the tenant performed that condition, or if, previous to any breach, the leſſor did (as no doubt he might) diſpenſe with the performance, there was no forfeiture; the leaſe did not become void at law, and there was an end of the defendant's defence. The queſtion, then, for the conſideration of the court, and the jury at the trial if the defendant had not demurred to evidence, was this—Did the leſſee literally, or ſubſtantially perform the condition; or did the leſſor previous to any breach diſpenſe with the performance? In ſupport of the plaintiff's action evidence having been offered and admitted, it was the duty of the judge to leave to the jury thoſe facts, if ſuch there were, from which they could infer either that the condition was performed, or the performance diſpenſed with. If there were no evidence from which any ſuch concluſion *could* have been drawn, and therefore the forfeiture of the term had become complete, the plaintiff ought to have been nonſuited. The queſtion then is, *could* the jury from the evidence before them, conclude either the one fact, or the other? If the jury *could* have drawn ſuch concluſion from the evidence, the defendant's demurrer admits it. *Cockſedge* and *Fanſhaw* fully eſtabliſhes this poſition. That the jury could have drawn either the one or the other of theſe concluſions from the evidence, no one

1788.

Sexton, leſſee of Freeman *againſt* Boyle.

one who has read and underſtood the evidence, as ſtated on the record, can, in my opinion, queſtion,----(*Here he ſtated and obſerved upon the evidence, and added*) whether the evidence was *ſufficient to ſatisfy the jury*, that the condition was performed or diſpenſed with; or whether the jury *ought* to have found one way or the other, are queſtions now totally immaterial. It is ſufficient that the jury could and might have found ſo. The ſeveral objections, therefore, made in argument, to the *weight* of the evidence, tho' proper to be made at the trial, and fit to be ſtated to the jury, are not now for the conſideration of the court. As my opinion therefore is, that the jury could from the evidence have concluded either that the tenant performed the condition, or that the leſſor had, previouſly to any breach, diſpenſed with the performance, there was no forfeiture of the leaſe, and, independently of this objection, it being confeſſed that the plaintiff made out a legal title to the poſſeſſion, he is now intitled to judgment.

Judgment being accordingly given for the plaintiff, the defendant brought a writ of error returnable in the *Exchequer Chamber*.---- The Chief Juſtices delivered their opinions to the Lord Chancellor, on Monday the 28th of *January* 1788.

Boyle *againſt* Sexton leſſee of Freeman in Error.

Lord *Earlsfort*---(having ſtated the caſe appearing on the record, proceeded)---In order to ſhew what effect the pleading may have upon the rights of the parties in this caſe, by the manner in which thoſe rights are brought before the court as the facts appear upon

1788.

Boyle *againſt* Sexton leſſee of Freeman in Error.

upon the record, I ſhall firſt make a few obſervations upon the nature of a demurrer to evidence; and having diſpoſed of the pleadings, I ſhall 2dly, examine the title made by the plaintiff below as admitted by the demurrer; and 3dly conſider the defence which is ſaid to ariſe out of the plaintiff's caſe, under the head of objections to the title of the defendant in error.

Firſt, A demurrer to evidence is an iſſue upon the matter of law ariſing out of the facts proved by the plaintiff to ſupport his title. It is in the nature of a general demurrer to the *pleading*, and ought to go to the ſubſtance and legal merits of the caſe. And that is the true reaſon why a demurrer to evidence admits as proved, and lets in every thing which may be fairly inferred by the jury: and as judges are bound to give judgment according to the right, if ſufficient matter appear upon the pleading; ſo they are, upon a demurrer to evidence, to preſume that as much appears and has been proved to ſupport the plaintiff's title (which is impeached by the demurrer), as they might have fairly inferred, if they had been on the jury: and this again, becauſe by the parties agreeing as to the facts, the jury by the demurrer are diſcharged; the demurrer being to the *legal* conſequences only of thoſe facts. Theſe obſervations, at the ſame time that they will, I think, have ſome weight in their application to the moſt difficult part of this caſe, will ſerve to ſhew why this mode has fallen deſervedly into diſuſe, and why it tends not ſo effectually to the advancement of juſtice, as the other various methods which have taken place,

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

place, as alſo why in many caſes---(I do not include the preſent)---it would not be the moſt prudent for the party demurring to adopt; becauſe it leaves to conjecture what might or might not have been inferred by a jury; which if found ſpecially could otherwiſe have been preciſely aſcertained.

What then is admitted by the demurrer in this caſe? The ſeiſin in fee of *Bellingham Boyle* the leſſor in the indenture of leaſe of 1739. The demiſe by him for 99 years, if any of the three lives named in that leaſe ſhould ſo long exiſt. A life in that leaſe in being at the time of the trial of this ejectment. The right of the tenant to the intereſt, if any, under that leaſe; (which tenant was leſſor of the plaintiff)---and enjoyment under that leaſe by him and thoſe under whom he derives. A receipt for two fines paid to *Bellingham Boyle*, indorſed upon the deed of 1739. The leſſee *William Freeman's* enjoyment for 20 years to his death in 1759. The enjoyment by *W. Freeman's* widow for 22 years down to 1781. The death of one of the *ceſtui-qui-vies* in 1764. And all this time no adverſe proceeding or attempt to take advantage of a forfeiture for 17 years down to 1781, when the leſſor of the plaintiff loſt the poſſeſſion by virtue of an *Habere*; but at whoſe ſuit, or for what reaſon, it does not appear. A letter addreſſed by *Jane Freeman* the widow of *William* the leſſee, 8 years before her death, to *John Boyle* the heir of *Bellingham*, demanding a renewal, and tendering to him the rent and fines. *John Boyle's* having in his hands 400l. as debtor to *Jane Freeman*. *John's* complying with the demand by

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

by promiſe, as ſoon as he could get his papers from *Dublin*. No objection for want of a ſurrender. No objection on account of any alledged forfeiture. No refuſal of fine or rent; and no objection at the trial to any of this evidence as irrelevant or impertinent. What then were theſe pieces of evidence relevant or applicable to? Manifeſtly to raiſe a preſumption, that either the ſurrender and all things made requiſite previous to the payment of the fine, were duly performed, or the performance diſpenſed with, and no forfeiture incurred. The promiſe to renew, and the acceptance of the fine were evidence that every thing previous thereto was duly performed: and therefore this evidence ſhould have gone to the jury, and might by fair inference have raiſed ſuch preſumption in their mind. Would it, for example, have been violence for the jury to draw theſe inferences---Mr. *Boyle* is an honeſt man: he would not have accepted of the fine if he meant to avail himſelf of the forfeiture. Mr. *Boyle* is a ſenſible man; when he took time to ſend for his papers to *Dublin*, he would not have promiſed to renew, if he had not either diſpenſed with a former ſurrender, or have been conſcious that a ſurrender had been made to him. It was eaſier and cheaper for the tenant to ſurrender than to nominate a life and pay a fine: and if the ſurrender had not been made or diſpenſed with, the ſame perſon who tendered might have ſurrendered and proved both if objected to at the time. Let us ſee what is admitted on the face of the deed of 7th *January* 1739, the indenture of leaſe from *Bellingham Boyle*, the tenant in fee. The recitals in that deed

are

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

are the moſt faithful and concluſive evidence of the conſtruction given by the parties, to the deed for near a century from 1669 to 1739; and which conſtruction ought to give a direction to the court, between the ſame parties and thoſe deriving under them; eſpecially where the words are entangled, and the means uſed by the parties for a certain purpoſe, are neither technical nor accurate. The ſurrender, for inſtance, is not to operate as a ſurrender, but as a grant. The leaſe of 1669 is recited to be a leaſe for 99 years, provided any of the lives therein named ſhould ſo long live; and not determinable upon the death of each life, unleſs a ſurrender ſhould be made; but the ſubſtantial part of the covenant is recited thus, and ſo the parties underſtood it. "*In which demiſe is contained a covenant for renewal for ever, upon the death of each life:*" and the only condition recited is---" the tenant paying 22l. upon each renewal within 12 months after the fall of every life;" and not a word of a ſurrender. The parties underſtood their own meaning. The leaſe was for a term of years, clogged with a condition calculated to give the landlord a certain emolument at ſtated times, and the 22l. being the object and fruit of the condition in favour of the landlord, the ſurrender, which was only an antecedent means to oblige the tenant to pay, and the landlord to renew, ſeems conſtantly to have been diſpenſed with, when the end of the ſurrender was effected without it, viz. the new life named and the fine paid; and therefore we find it recited in the leaſe of 1739, that a renewal was had in 1717 by *Eleanor Freeman* "*who was intitled*

1788.

Boyle, *againſt* Sexton, leſſee of Freeman,

titled to a renewal" as is recited; but not a word of her having ſurrendered; but the ſubſtantial part of the covenant is recited in this renewal, viz. " for 99 years, *provided any of the three lives then named ſhould ſo long live*;" The next renewal recited is that in 1727, under the ſanction of the Court of *Exchequer*, (ſuppoſed to be had under the ſtat. 11 *Ann.* certainly not regularly), and yet in the recital of that renewal, though in an adverſe ſuit, no ſurrender is recited to have been made. In the leaſe of 1739 two lives inſerted, and two fines paid, and no ſurrender mentioned: and yet it is recited to have been *according to the original covenant of the firſt leaſe.* By theſe three renewals then, the parties themſelves explain their conſtruction of the covenant, and how it had been carried into execution. The ſurrender was not thought neceſſary, if both parties were ready to comply with that, which was the object of it, viz. nomination, and payment of the fine by the tenant on the one hand, and renewal by the landlord on the other. It would therefore be a violent and unjuſt conſtruction in the court, againſt the declared intention of the parties during almoſt a century, to conſtrue this to be a leaſe for 99 years, if any of the three lives ſhould ſo long continue, *determinable nevertheleſs upon the death of the firſt*; as the Sollicitor General ſtrongly put it. It is unneceſſary that I ſhould go into any of the learning upon void or contradictory covenants, becauſe the parties have given this a rational conſtruction for a great length of time, but at preſent it would be ſcarcely decent, after the lords have determined that this very covenant, in another

1788.

Boyle. *againſt* Sexton, leſſee of Freeman in Error.

another caſe, ſhould be carried ſpecifically into execution. † I alſo throw out of this caſe all learning upon forfeitures once complete, and as to the different conſequences of forfeitures in caſes of freehold; as my opinion is grounded *upon there having been no forfeiture incurred* in this caſe. But I think the court are relieved from giving any opinion upon this covenant, whether the want of a ſurrender ſhall create a forfeiture; though after what I have ſtated as to the conſtruction given by the parties, it would be an harſh conſtruction, to ſay that an inſtrument calculated to *perpetuate*, ſhould be conſtrued to annihilate. But upon this point, I ſay, I think it not neceſſary to give any opinion, becauſe npon this demurrer the main queſtion I take to be, whether there was not evidence to go to the jury, from which they might fairly infer, either that there was an actual ſurrender, that is, that a ſurrender may be fairly and legally preſumed, or that the condition, which requires a ſurrender, was diſpenſed with and a forfeiture *prevented* by the act of the landlord: in either of which two caſes, I think the leſſor of the plaintiff ſhould have recovered.

This brings me to the third point that I propoſed, the defence ariſing out of this covenant, to the landlord, who was the defendant in the ejectment, and who took the demurrer. 1ſt. It is objected, that in the leaſe of 1739 there is a covenant which makes void the leaſe, unleſs there be a ſurrender by the tenant within twelve months after the fall of each life, and that this being a leaſe for a term of years, the forfeiture

† Boyle v. Lyſaght and Purdon, adminiſtrators of Wrixon. Ante, 135.

1788.

Boyle. *againſt* Sexton, leſſee of Freeman in Error.

forfeiture is complete upon the expiration of twelve months after the death of *William Freeman*, one of the lives, in 1764, for want of ſuch ſurrender. The anſwer is, (without going back into the queſtion, whether the want of a ſurrender calculated to perpetuate the term and expreſsly declared by the deed not to be intended to operate as a ſurrender, could narrow a grant for 99 years, if *any* of the *three* lives ſo long lived to a leaſe for *one* life *only*, and that by a covenant ſubſequent to the *habendum* for 99 years; I will ſuppoſe, for argument ſake and to put it moſt ſtrongly for the defendant, that the want of a ſurrender ſhould create a forfeiture. I anſwer upon the authority of the caſe of *Cockſedge* againſt *Fanſhaw*, *Doug.* 128,) that there was evidence here to go to the jury, who were to judge of every thing *probable*, that probably a ſurrender was made in 1764, or 1765, within twelve months, or that the rent never would have been paid and accepted of, as it was proved, to 1773, and that nine years after the defendant *John Boyle* would neither have accepted the fine, nor promiſed to renew, unleſs he had thought himſelf bound, and that a ſurrender had been actually made. The deed of ſurrender, if made, was not in the tenant's (the leſſor of the plaintiff's,) power. The perſon who ought to have made the ſurrender, was not living at the trial of the ejectment in 1785. *Jane*, if living, *might* have been able to furniſh proof of a ſurrender: after twenty years a court would preſume a previous ceremony loſt in its conſequences, namely, the acceptance of the fine, and promiſe to renew; it is like the caſe of accepting of a new grant, which raiſes a preſumption

1788.

Boyle. *againſt* Sexton, leſſee of Freeman in Error.

preſumption of a ſurrender of the former. But it is ſufficient for me to ſay, that there was evidence to go to the jury to enable them to judge of the probability of that fact, and from which they might have fairly inferred or preſumed, that there was an actual ſurrender within the limited time; the landlord and tenant having both continued to go on as if there had. I do not urge the acceptance of the rent as the means of ſetting up a nullity, (I know it can not,) but as evidence to ſhew that there was no forfeiture ſuffered to incur; for that could not have taken place conſiſtent with the landlords ſubſequent conduct, without an imputation of fraud or folly. But 2dly. I will ſuppoſe that the jury neither did, nor could have applied the evidence to ſupport a preſumption of an actual ſurrender; was there not ſtrong evidence that the defendant, acting in conformity with his anceſtors, and following what ſeems to have been the uniform practice of every landlord to this leaſe for 106 years, *prevented a forfeiture*, by diſpenſing with a part of the condition, which part was merely a previous ceremony to enforce what the landlord accepted voluntarily, viz. the payment of the fine, and the nomination of a new life; and without compulſion renewed to the tenant, the object of the covenant being mutually attained? was there not proof that he accepted of the fine and the rent, and ſubmitted to the nomination of the life, and promiſed to renew. Theſe facts are all applicable to ſhew that either the covenant was complied with, or prevented by the landlord from being complied with, or that he conſidered the covenant as ſubſtantially complied with, and was himſelf

1788.

Boyle *against* Sexton, leſſee of Freeman in Error.

himſelf the cauſe why the tenant did not comply literally with the ceremony of ſurrendering previous to his paying the fine and nominating the new life. It only remains then to ſhew, that the landlord may diſpenſe with the manner of complying with the covenant, or that the tenant is not to forfeit, if he were prevented from performing it literally. Now it is laid down in *Littleton*, *ſect.* 334, that "if a man tender money on a day mentioned in the condition, or if his heir on that day make the tender, or if the tender be made and refuſed, it is a good performance of the condition;" and Lord *Coke* in his comment upon this ſection, 1 *Inſt.* 205. *b.* aſſigns the obvious reaſon, "becauſe if the heir perform the condition, the perſon paid receives no damage;" and in 206. *b.* he ſays expreſsly, "if the perſon to whom the condition was to be performed, prevent its performance, *he ſhall never take advantage of the non-performance.*" Apply that rule to this caſe: was there not evidence to go to the jury, that, if the condition were not performed, it was or might have been attributed to the landlord. Why did he receive the rent? why did he promiſe to renew? why did he acquieſce? may not the jury have fairly inferred that he had prevented? but could he have prevented it? he manifeſtly could. The tenant has by this leaſe twelve months to ſurrender; may not the landlord ſay at any time within the twelve months, pay me the fine; pay me the rent: I will renew; you need not ſurrender; that is only a mean calculated to *oblige* me to renew, and you to pay the fine: I am not damaged, and I never can afterwards take advantage of an omiſſion, which I myſelf occaſion: I, by

1788.

Boyle. *againſt* Sexton, leſſee of Freeman, in Error.

receiving the fine, prevent the forfeiture. It is objected that the condition can not be waved. But I think a condition which introduces a ceremony to enforce the doing of a particular act, may be waved, if the object be otherwiſe equally well attained, by the conſent of the parties, and as it was in this caſe, and in that in *Co. Lit.* Then it is ſaid, this grant cannot be confirmed by rent accepted. That is taking it for granted, that a forfeiture had incurred. It is further objected, that the evidence of performance is inconſiſtent with that of waver, and *vice verſa*. That is a mere play of words, neither conſiſtent with the rules of logic, nor applicable to the evidence; for firſt the objection anſwers itſelf, by admitting that either performance or waver of the condition might have been inferred; and if either might have been inferred, it is ſufficient; for it is not neceſſary that both ſhould have been. If a man endeavour to prove two contradictory propoſitions, the proof will deſtroy but one of them, and either of them will in this caſe anſwer the tenant's purpoſe. But the reaſoning does not apply here, for the evidence given was of acts of the landlord, which furniſhed two preſumptions, either that the condition was performed, or that the landlord prevented a forfeiture by diſpenſing with the literal performance of all parts of the condition. The word waver has been in this caſe inaccurately applied. It is the giving up of an advantage actually gained. A previous diſpenſing with the performance of a condition, is the expreſſion that ſhould have been made uſe of; for that is anticipating the event which might occaſion the breach, and prevent the

1788.

Boyle *against* Sexton, lessee of Freeman in Error.

the possibility of incurring a forfeiture: and in this case a substantial performance, by paying the fine, might have been the inducement to the landlord to dispense with the surrender, or the landlord's offering to take the fine, and continuing the grant, might have been the cause why no forfeiture could afterwards incur. Another objection is, that the evidence was not *offered to prove a surrender*. I answer, this is a *Petitio Principii*, which takes the whole question in dispute for granted, namely that there was a forfeiture; whereas the evidence goes to shew that there was no forfeiture, by proving facts which presuppose the condition performed. Objection. The evidence of a a waver argues a breach. Answer, that is a sophism and a misapplication of the term *waver*. The evidence was not of a waver of a forfeiture, but of acts of the landlord, which presumed no forfeiture. Objection. The demurrer only admits what the evidence was produced to prove in the view in which it was offered. Answer. Evidence is offered to support the lessor of the plaintiff's case, and being admitted is open to all fair and necessary inference, sometimes against the party producing it, sometimes, with more weight than he was aware of, for him, and in a point of view very different from that in which it was produced. The question is, was there evidence here, from which the jury might have inferred that an actual surrender was made, and ought to be presumed, or whether, if not, it had not been prevented by the landlord's own act, and whether his subsequent conduct did not justify either of these suppositions? I think there was, and that if there had not been a

1788.

Boyle *againſt* Sexton, leſſee of Freeman, in Error.

joinder in demurrer, and the facts had been left to the jury, the judge might have told them, that if they believed either that there was a ſurrender, or that a ſurrender had been prevented by any act of the landlord, they ſhould find for the plaintiff in the ejectment. Conſequently I am of opinion, that the judgment of the court of Exchequer ought to be affirmed. As to the *habere*, it does not appear at whoſe ſuit it was executed nor whether in an ejectment on the title, or for non-payment of rent; and no uſe was made of it by the defendant *Boyle*. With regard to awarding a *venire de novo*, that would be unjuſt, as I think there is ſufficient appearing on the preſent record, to entitle the plaintiff in the ejectment to recover.

Carleton, C. J. of C. B. (After ſtating the caſe.) It having appeared in evidence, that *Baſtable* (one of the *ceſtui qui vies*, named in the deed of 1739,) is living, it becomes proper, in the firſt place, to conſider whether the proviſo contained in that deed be totally inſenſible or repugnant to the grant, and therefore void; and whether in conſequence thereof, the leaſe muſt continue for the remainder of the term of 99 years, determinable on the fall of *Baſtable's* life, and diſcharged from the proviſo therein mentioned. It will be then proper to conſider the nature of a demurrer to evidence, and the extent in which the party who demurs to evidence by that act, admits the facts to which the evidence ſo demurred to applies; and then, whether the evidence does or can amount to a waver of the forfeiture committed; ſuppoſing that by the non-performance of the terms compriſed in the proviſo, the forfeiture had been completed; then, whether the evidence amounts to a re-delivery of the deed

1788.
Boyle *againſt* Sexton, leſſee of Freeman, in Error.

deed of 1739, or to a new grant; and laſtly, whether the evidence appearing on the record, conſidered with a reference to the nature and conſequence of a demurrer to evidence, can in any way maintain the title of the leſſor of the plaintiff, the defendant in error.

As to the firſt of theſe queſtions. The proviſo, altho it is deliberately complex, and cautiouſly puzzled, is neither inſenſible nor repugnant. To give force to the firſt part of this objection, the proviſo muſt be ſo totally dark as to be abſolutely incapable of expoſition. Conſider this proviſo as abſtracted from all collateral circumſtances, whether appearing in or out of the leaſe. The parties might have meant that the tenant ſhould have, at his option, a power of enlarging his intereſt upon performing certain requiſites, and under certain terms, or of intirely putting an end to his intereſt. If the tenant elected the former, the mode was this: The tenant might within 12 months after the fall of a life, tender the renewal fine of 22l. a new leaſe for 99 years, determinable on the fall of the old then exiſting lives, and ſuch new life as ſhould be then named, and alſo a conditional ſurrender. The landlord was to have three months to execute the renewal, and as the ſurrender could not be valid until acceptance, the tenant was during that interval to hold under his old title. If the landlord ſhould accept the ſurrender and execute a renewal, then the tenant was to hold under that renewal for the term of 99 years to be completed from the date of the ſurrender, determinable upon the old ſubſiſting lives, and the newly added life. If he ſhould not accept the ſurrender, a new intereſt

1788.

Boyle *againſt* Sexton, leſſee of Freeman, in Error.

intereſt was as it were to ariſe out of the aſhes of the old one, and the tenant was to hold under the old leaſe for the remainder of the whole term for years abſolutely. He was to retain a legal eſtate and all his equitable claims. But it is not neceſſary to give an abſolute opinion, that this is the proper meaning of the proviſo, for if it can have any meaning given to it, this objection is anſwered. Nor is the proviſo repugnant to any known incident of the eſtate granted; nor is it directly oppoſed to the original grant; nor does it at all events determine or annul the effect of it. The leſſee might poſſibly have held to the end of the term for 99 years granted by the deed of 1739. The utmoſt poſſible operation of the clauſe as againſt the title of the leſſor of the plaintiff, is, that the intereſt might determine at a period ſhort of the original term, unleſs the tenant performed certain acts, by the performance whereof he might retain the leaſe in full force, or even enlarge the term, and obtain an intereſt which muſt exiſt to the end of a particular time, inſtead of one which might determine at an earlier period. This is not an exception (as in ſome of the caſes cited) fruſtrating the whole grant: it is merely an option given to the parties of making an alteration in the duration of the term, on the performance of certain things. The intereſt is to be enlarged or determined by a collateral or contingent matter, and the operation of the clauſe is to depend upon the ſubſequent conduct of the parties. But whatever might have been the conſtruction of this proviſo *abſtractedly conſidered*, the acts of the parties have given it a decided meaning. The leaſe of 1739, recites

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error,

cites the original leaſe of 1669 to have contained a *covenant for perpetual renewal*, and that the renewal of 1717 to *Eleanor Freeman* was executed, ſhe being *entitled to a renewal, for the like term*, rent, duties and *covenants* as in the original leaſe: that the renewal of 1727 was in conſequence of an order on petition, and was *for the like term*, rents, duties *and covenants* as in the original leaſe. This is as ſtrong as if the parties had expreſsly declared, that each of thoſe renewals contained a covenant for perpetual renewal. The rent and renewal fines were the ſame in every leaſe. The original leaſe and the renewals are recited in the leaſe of 1739, as introductory to and connected with that leaſe; and that renewal proceeds on the ſuppoſition of an exiſting right thereto, and it recites that "two renewal fines had been paid, purſuant to the ſaid covenant in the original leaſe," that is, to a covenant for perpetual renewal. The parties therefore have put their conſtruction on this proviſo, as the mode of ſecuring a perpetual renewal; and whilſt it is poſſible to give the clauſe (which was adopted as the medium of prolonging the term,) an intelligible conſiſtent conſtruction, ſuch ought to be adopted. It is under this clauſe alone, that the tenant can claim any extenſion of his term, and it was on exactly the ſame kind of clauſe that the lords, in *Boyle* againſt *Lyſaght* and *Purdon*, * inſtead of conſidering it as inſenſible or repugnant, decreed an enlargement and renewal of the tenant's intereſt.

I ſhall now conſider the nature of a demurrer to evidence, and the extent in which the party

*Ante, 135.

1788. party demurring admits the facts to which the evidence applies. The plaintiff in error has reforted to this mode of defence, and muſt abide by all its legal conſequences. A demurrer to evidence is a very antient mode of defence, and if rightly conſidered is not liable to *all* the objections which have been made to it, though perhaps it is open to ſome; ſuch as, for example, the difficulty of deciding how far the concluſion in point of fact may under particular circumſtances extend. It ſubmits the deciſion of the law to the court; but does not transfer to the court the right of deciding upon facts. It does not preclude the party, againſt whom it is offered, from any legal defence, tho it may ſometimes perhaps furniſh againſt the party producing it, the admiſſion of a ſtronger concluſion in point of fact, than a jury might have drawn, if it had been permitted to decide. There is ſome doubt entertained in the books, whether, under certain circumſtances, the party producing a certain ſpecies of evidence, is bound to join in demurrer; but that difficulty does not intervene in the preſent caſe, for there has been a regular joinder in demurrer. The demurrer admits concluſions of fact, *ariſing upon the evidence*; but it cannot be extended to concluſions, as to matters not of record, to be drawn from that to which the evidence does not apply, and which lying merely in the ſuppoſed knowledge of the jury, the court not being poſſeſſed of any material to judge upon, the court could form no opinion of. The form of the demurrer decides this; for it ſubmits to the court whether *the evidence* is ſufficient in law to maintain the iſſue; and not, whether the evidence, and

Boyle *againſt* Sexton, leſſee of Freeman in Error.

thoſe

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

thoſe unrecorded facts, which may perchance lie within the knowledge of the jury, (but which are not ſubmitted to the view of the court,) may be ſufficient for that purpoſe; and accordingly in *Cockſedge* v. *Fanſhaw*, *Doug.* 114, the judges ſay, the demurrer admits all facts which the jury could have found *on the evidence ſtated*. It would be otherwiſe impoſſible for the court to form any judgment, whether the ſuppoſed concluſion bore any relation to the premiſſes from whence it was to be deduced. There could be no caſe ſo illegal or irrelevant, in which the jury might not by poſſibility be informed of unrecorded facts, capable of eſtabliſhing the title of the perſon offering the evidence. The ſuppoſition that the jury might poſſibly be informed of that which might be competent to ſupport ſuch title, could never be controuled by any negative capable of proof: nor could it ever be intended that the jury might not know what might eſtabliſh the title of the party producing the evidence. As to the caſe of *Fitzharris* v. *Boiun*, 1 *Lev.* 87: it is very loſely ſtated, and the nature of the evidence which was given, does not clearly appear. It ſeems as if evidence in fact had been given of an arreſt; but that it was objected that the writ, under which the arreſt had been made, ought to have been produced; and poſſibly the obſervation made by the court, as to the knowledge of the jury, was confined to mere matters of record, whereof it was at that time ſuppoſed the court and the jury might equally take cognizance, though no expreſs evidence had been given thereof. Conſidering it in that confined point of view, it is unneceſſary to give any further opinion

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

opinion on that caſe. The deciſion may be right, but if the reaſoning mentioned in that caſe is to be extended to parol, unrecorded facts, which may by poſſibility lie within the knowledge of the jury, but whereof the court can have no judicial knowledge, it is contradicted by the form of the demurrer, and by the rule laid down in *Cockſedge* and *Fanſhaw*. What then is the extent in which a demurrer to evidence admits the fact to which ſuch evidence applies; and what is the power with which the court is inveſted by ſuch demurrer? The concluſion cannot be confined to the admiſſion of thoſe facts which are directly and poſitively ſworn unto; for that would infringe upon the right of a jury, and would deprive the party of the benefit of thoſe concluſions of fact, which might be drawn from preſumption and probability, if the cauſe were left to the deciſion of a jury. The object of a demurrer is to refer the deciſion of the law to the court, but to leave the party in the full enjoyment of every advantage which he might have derived as to concluſion in matter of fact, if the evidence had been referred to the determination of a jury. If the virtual admiſſion on circumſtantial evidence, ariſing from the demurrer, were confined to facts directly and poſitively proved, the concluſions of fact would not be as ſtrong as thoſe which a jury might have inferred; and thereby the right of the party might be injured. The admiſſion therefore on circumſtantial evidence muſt be extended as far as the legal power of the jury extends in the determination of facts, on ſuch teſtimony; and conſequently to all concluſions of fact, as to which the evidence is admiſſible, and to which

1788.

Boyle *againſt* Sexton, leſſee of Freeman in Error.

which it is properly relevant and applicable. Thus the rights of the court and of the party will be preſerved. The court will decide upon the law. The caſe will be taken, as if the jury had determined upon the evidence in its fulleſt applicable extent, and the party will have the benefit of the utmoſt latitude of poſſible relevant concluſion. In *Doug.* 114, the queſtion aroſe upon the right of free-men factors, to retain a certain toll to their own uſe, as againſt their employers. The evidence of uſage extended only to the commencement of the preſent century, but it being relevant and applicable, and furniſhing *a preſumption* of an uſage time out of mind, that concluſion of fact was admitted by the demurrer, and the court merely conſidered whether ſuch uſage could have had a legal origin, and in the opinion given upon that caſe, the virtual admiſſion is confined to concluſions to be drawn *upon the evidence ſtated*: which reſtriction will exclude the admiſſion of totally abſurd and incongruous concluſions. If the evidence be relevant and applicable to a particular concluſion, and fit to go to the jury thereupon; that concluſion is admitted: it is for the court to decide whether the evidence has any reference to ſuch a concluſion; but if in the opinion of the court it has ſuch reference, the court cannot weigh the credibility of witneſſes, or the truth or probability of facts: the party is to be in as good a ſituation as if he had had a ſpecial verdict, compriſing all thoſe facts expreſsly found, which might properly have been inferred from the evidence: and the queſtion will be whether there was in this caſe evidence, or, as the books expreſs it, *inducements* of truth, or *appearance*

1788.

Boyle *againſt* Sexton, leſſee of Freeman, in Error.

pearances of truth, ſufficient to be left to a jury, whereupon they might have drawn a relevant concluſion of fact, capable of maintaining the title of the leſſor of the plaintiff. The authorities on which I principally found my judgment on this part of the caſe, are *Raſtal* 317, *Bro. Gen. iſſue pl.* 51. 2 *Sid.* 147, *Olive* v. *Green. Plowden, (Scolaſtica's* caſe) 410, 411. 1 *Inſt.* 72. *Cockſedge* v. *Fanſhaw, Douglas* 114.

Upon this part of the caſe, I ſhall conſider whether the evidence does or can amount to a waver of the forfeiture committed, ſuppoſing that, by the non-performance of the terms contained in the proviſo, the forfeiture has been completed? Where a forfeiture has been completed, and thereby the eſtate has been abſolutely avoided, the forfeiture cannot be waved by parol, ſo as to ſet up the grant: *è contra*, where there is a mere *election* given to render the act or omiſſion a forfeiture, and ſome further act is requiſite to compleat the forfeiture. A void intereſt cannot be revived by a mere waver by parol. A voidable may. Where the queſtion is, whether the intereſt is void, or merely voidable, the diſtinction between freeholds and leaſes for years is material: the former retain part of that ſuperiority which the common law gave them over the latter, and are not ſo eaſily determined: they require an entry to avoid them. As to leaſes for years, in the caſe of a collateral condition or covenant, where no re-entry is declared to be neceſſary, but it is declared by the inſtrument, that upon a breach of the condition the intereſt ſhould be void; waver by parol will not eſtabliſh that, which had become abſolutely void;

1 *Inſt.*

1788.

Boyle *againſt* Sexton, leſſee of Freeman in error.

1 *Inſt.* 215, *a.* 295, *b.* 3 *Co.* 64. *Pennant's* caſe. *Cro. Car.* 511. *Mulcarry* v. *Eyres.* Here the intereſt, if the requiſites were not performed or diſpenſed with, is rendered *void* by an omiſſion to make the proper tenders within 12 months.

I ſhall now conſider, whether the evidence amounts to a redelivery of the deed of 1739, or to a new grant: the principle in leſſee of *Carter* v. *Straphan. Cowp.* 201, is good law, viz. that circumſtances may be equivalent to an actual delivery, and the doubt ariſing upon that caſe is, only, whether the particular circumſtances thereof were ſufficient to bring it within the rule. That caſe aroſe upon the deed of a married woman, unattended by a fine; and the firſt execution thereof being during her marriage, it was void; and the inſtrument was capable of a new delivery after her huſband's death. But the authority of *Perkins*, *ſect.* 154, there cited, ſhews that where the original delivery was not void, but had an effect, a ſecond delivery of the inſtrument is void; now here the deed of 1739 was a good and valid deed at the time of its execution; and its ſuppoſed invalidity aroſe from tranſactions long ſubſequent to its execution, and conſequently, upon the avowed principle in the caſe in *Cowper*, there could be no redelivery thereof.

I ſhall now examine whether the evidence appearing on the record conſidered with a reference to the nature and conſequences of a demurrer to evidence, can *any way* maintain the title of the leſſor of the plaintiff, the defendant in error. If there were no proviſo, the title of the defendant in error would be clear;

1788.

Boyle *against* Sexton, leſſee of Freeman in error.

clear; but it is alledged that the terms of that proviſo were not performed in due time; and that thereby the leaſe was avoided. If an eſtate be granted upon condition ſtrictly made, and one of the parties be prevented by the other from performing it; the party ſo preventing, cannot avail himſelf of the breach. 1 *Inſt.* 206---*Jones* v. *Barkley*, *Doug.* 659. *Term Reports*, 645. *Hotham* v. *Eaſt India Company*. Upon an ejectment no ſpecial iſſue is joined: the whole of the title of the parties is opened by the general iſſue; and the evidence muſt be applicable and applied to every matter to which the title adduced extends. Many of the arguments urged on behalf of the plaintiff in error, apply to the *weight* of the evidence, and not to its relevancy to the title of the defendant in error, and that too, without any evidence being given on the part of the plaintiff in error, to controul the teſtimony given on behalf of the defendant in error. By the renewals of 1717 and 1727, and by the recitals in the deed of 1739, the parties have expounded the nature of the eſtate of the tenant, and have conſidered it as comprizing a right of perpetual renewal. The tender of the renewal fines and of an engroſſed leaſe, and of a ſurrender were merely the means of acquiring the renovation of the legal eſtate; and the execution of the renewal was only ancillary to the equitable veſted right. It was within the power of a jury to judge, whether upon the renewals there had been a ſurrender and a tender of a renewal fine and of an engroſſed leaſe within the limited time. Conſidering the acts of the anceſtors of *Bellingham Boyle* (the leſſor

1788.

Boyle *againſt* Sexton, leſſee of Freeman in error.

leſſor in the leaſe of 1739) and the recitals compriſed in that deed, the plaintiff in error might, by a jury, be fairly ſuppoſed to have been conuſant thereof, and to have been inclined to do as his anceſtors had done before him; and theſe matters might afford much occaſion of diſcuſſion to a jury, as relevant to an unforfeited title. In 1759 one of the *ceſtui-qui-vies* died, and in 1764 another of them fell, but whether the tenant within the limited time tendered a ſurrender and renewal fine, and a new leaſe, or whether he was totally guilty of an omiſſion thereof; or whether he was prevented by the landlord from doing the ſame, are matters to which there is no expreſs proof applied. However they were fit to be judged of by circumſtances properly coming under the conſideration of a jury. From 1759 to 1773, the tenant held the poſſeſſion as tenant; all rent and arrears of rent were paid up to *Michaelmas* 1773; thoſe payments were made under the covenants in the leaſe of 1739, and were accepted of, *as under that title*, and on the principle of the leaſe having then an exiſtence: and it was for a jury to conſider, whether thoſe payments did not furniſh an half-yearly recognition of an unforfeited title. In or about the year 1773, the tenant demanded a renewal, and wrote to the plaintiff in error (who was the heir at law of the ſaid *Bellingham Boyle*, and was then intitled to the inheritance) and tendered the amount of the fines and the arrears of rent. This is ſtated to have been a *demand* and not a *ſupplication*; and the plaintiff in error replied, that he would write to *Dublin* for his papers, and would comply with the tenant's

demand.

1788.

Boyle *againſt* Sexton, leſſee of Freeman in error.

demand. What theſe papers were to which he alluded, is not aſcertained, but it does not appear that it was neceſſary to inſpect them, in order to acknowledge the tenant's right of renewal. At that time, 400l. were due to *Jane Freeman* the then tenant, as executrix of *William Freeman* the former tenant, by the repreſentatives of *Bellingham Boyle*. Whether that ſum had been due from the times of the ſuppoſed breach of the proviſo, or whether it was due by the real or perſonal repreſentatives of *Bellingham Boyle*, or by both, is not particularly ſtated: it might be by either or both. The plaintiff in error was undoubtedly the heir at law; whether he was the perſonal repreſentative does not expreſsly appear. If he in either capacity was liable to the demand of 400l. it was a matter proper for the conſideration of the jury, whether the promiſe (connected with other circumſtances) was not a recognition of *an exiſting right* in the tenant to a *continuing intereſt*; and whether, as the landlord appeared to have a ſufficient fund in his hands to diſcharge the renewal fines and the arrears of rent, he might not have retained a ſufficient part of the 400l. as applicable to that purpoſe: for any thing appearing on the evidence it might have been ſo applied by the father of the plaintiff in error. The leſſee held the poſſeſſion until 1781, 22 years after the fall of one of the *ceſtui-qui-vies*, and 17 years after that of the other. Length of poſſeſſion is not merely (as was contended) evidence of itſelf, *i. e.* of its own exiſtence; it has founded a preſumption of meſne aſſignments, of the making a tenant to the præcipe, of the loſs of deeds, patents, acts of parliament,

1788.

Boyle *againſt* Sexton, leſſee of Freeman in error.

ment, and of many other things neceſſary to ſupport a title warranting ſuch poſſeſſion.--- Here it was not a mere poſſeſſion unconnected with other circumſtances; and it was competent to a jury to deliberate, whether the poſſeſſion, connected with the other circumſtances in the caſe, furniſhed evidence ſatisfying their judgments that, *ſome how or other*, no forfeiture of the title had been committed. Whether any ejectment was ever brought by the landlord, does not clearly appear; for as to the *habere* which was executed in 1781, it does not appear by whom it was obtained, nor whether it was iſſued upon an ejectment upon the title, or upon one brought for non-payment of rent: but it was matter for the conſideration of a jury, whether it was obtained by a ſtranger, or by the plaintiff in error, and on what title it was founded. If a ſurrender had been executed in due time, and delivered to the leſſor of the plaintiff, the tenant could not now be preſumed to produce it. Can the court now ſay, that all this evidence afforded no ground for an honeſt jury to find upon? If the evidence were ſuch as ought to have been weighed by a jury as relevant to the title of the leſſor of the plaintiff, the difficulty of drawing the concluſion will not avail. In 1773 the renewal was *demanded*, and not aſked as a favour, and the reply was an *engagement* to perform the requiſition, and not a *refuſal*. The jury had a right to decide whether it was not an acknowledgment of a then exiſting right: it might have amounted to this, that the tenant had a right to make a demand (the tenant being originally intitled to a perpetual, renewable intereſt, and

1788.

Boyle *againſt* Sexton, leſſee of Freeman in error.

his title never having been forfeited,) and that the landlord would accordingly renew, *as under that right*, but that he had not then in his poſſeſſion, at the place from whence he wrote his anſwer, his part of the leaſe of 1739, ſo as to be enabled to cauſe a new leaſe to be prepared with all beneficial clauſes. It was alſo a matter for a jury to deliberate upon, whether when the plaintiff in error had *offered* to renew, he was not conſcious that he was really *bound* to do ſo. They had a right to conſider, that inſtead of any objection being made of the non performance of the terms required, the landlord had promiſed to renew when he could get at his papers; whereas if the circumſtances required had not been performed, and there had been no diſpenſation as to the performance of the proviſo, the landlord would have been intitled to the poſſeſſion of the premiſſes in the year 1760; but that rent had been received in the year 1773, and poſſeſſion had been held until the year 1781; which circumſtances ran very ſtrongly againſt the ſuppoſition of the leaſe having been avoided in the year 1759 and 1764. I am not under the neceſſity of deciding whether upon the *weight* of the evidence, a jury *ought* to have drawn a concluſion in fact capable of maintaining the title of the leſſor of the plaintiff. *That* belonged to the juriſdiction of a jury. I hold that the evidence was fit for their conſideration *as applicable to a concluſion in fact which might in point of law have maintained the title of the leſſor of the plaintiff.* And it would have been for them (if the evidence had been referred to them) to have decided whether the evidence

1788.
Boyle *againſt* Sexton, leſſee of Freeman in error.

dence was ſufficiently credible, probable, or weighty, to have warranted ſuch concluſion: it's being doubtful whether, upon *minutely weighing* the evidence, it was ſufficient to authorize a concluſion eſtabliſhing the title of the leſſor of the plaintiff, does not furniſh an argument in favour of a court of law's aſſuming a right of determining that fact, to the excluſion of a jury. Whether there was applicable evidence to go to a jury, was the province of the court to decide: no objection appears to have been made on that ground; it was ſuffered to go to the jury: was applicable to the title of the leſſor of the plaintiff: the judge at *Niſi Prius* could not then have nonſuited the plaintiff: nor can I ſay the jury might not, on weighing the evidence, have drawn a concluſion concurring with length of poſſeſſion, reprobating the idea of a forfeiture, and preſerving the eſtate of the tenant. I therefore, (conſidering the nature and conſequences of a demurrer to evidence) am of opinion that the judgment ought to be affirmed.

The Lord Chancellor, declared that he ſo thoroughly concurred in the opinion delivered by their Lordſhips, that he thought it unneceſſary for him to enter into a diſcuſſion of the ſubject.

Judgment affirmed.

HILARY TERM, 1788.

28 Geo. III. *Continued.*

Friday 1ſt. *February.*

Dixon *againſt.* Fuller.

DIXON againſt FULLER, *Exchequer.*

The defendant having effects of A. in his hands, accepts a bill drawn by him in favour of B. whom he admits to be a fictitious perſon. A. paſſed the bill with B's name indorſed to C. who indorſed it to plaintiff. Plaintiff declares upon the bill and gets a verdict, the court refuſe to ſet it aſide upon the objection that the averment of B's indorſement was not proved.

THIS was an action againſt the defendant as acceptor of a bill of exchange drawn by *William Fleming* in favour of *James Smith*, who, the declaration ſtated, indorſed it to *Robert Fleming*, who indorſed it to the plaintiff. The declaration contained no other count. Upon the trial, before the Lord Chief Baron, the hand-writings of the defendant, and of *Robert Fleming* were proved; but inſtead of proving the hand-writing of the payee, the plaintiff read in evidence the defendant's anſwer to a bill in equity filed againſt him by the plaintiff; in which anſwer the defendant admitted that the payee was a fictitious perſon, and that he the defendant had had value of the drawers in his hands to pay the bill, and paid it over, upon receiving an indemnity, to the aſſignees of the drawer, who had become a bankrupt. It alſo appeared that *William Fleming* had paſſed the bill to *Robert Fleming* who paſſed it to the plaintiff. It was

1788. Dixon *againſt* Fuller.

objected by the defendant's counſel, that the plaintiff having in his declaration ſtated an indorſement by *James Smith*, was bound to prove it. The Chief Baron at firſt was inclined to ſave the point; but afterwards was of opinion to leave it to a motion for a new trial; and the jury, to a queſtion from the court (the ſending up a ſpecial iſſue being waved), having anſwered, that they found that *James Smith* was a fictitious perſon, he directed them to find for the plaintiff, which they did.

Mr. *Curran* and Mr. *Butler* now argued in ſupport of the motion for a new trial.—The plaintiff has declared upon a bill of exchange payable to *James Smith*, by whoſe indorſement he intitles himſelf to this action. The averment of *James Smith*'s indorſement, therefore, ought to have been proved. Subſequent indorſements are not neceſſary to be ſtated, yet if they are ſtated in the declaration, they muſt be proved. *Briſtow* v. *Wright*. *Doug*. 640. But the indorſement by the payee is abſolutely neceſſary to intitle one who is a ſtranger to the original contract, which is aſſignable only as the legal mode of aſſignment is purſued. Here the plaintiff inſtead of proving that material averment in his declaration, diſproves it, and endeavours to make out a caſe to ſhew the impoſſibility of proving it.—This evinces that he has miſtaken his action. If the payee be a real perſon, his indorſement muſt be proved; the law is clear as to that; but if he be a fictitious perſon, the inſtrument is not indorſeable, and therefore not a bill of exchange, however it may amount to a contract between the drawer and acceptor; not being a bill of exchange,

change, it cannot be declared on as ſuch.— It is a rule that contracts muſt be declared upon according to their legal operation. If there was no payee, the property of the debt was in the drawer, who only could transfer it, whereas here it is ſtated to have been transferred by the act of another. 1788. Dixon *againſt* Fuller.

Mr. *Duquery*, *contra*, was ſtopped by the court.

Yelverton, Chief Baron.—This is an action by an indorſee againſt the acceptor, who confeſſed that the payee is a fictitious perſon, and that he, the acceptor, had value in his hands, which he paid over to the aſſignees of the drawer upon receiving an indemnity. The bill is drawn in favour of *James Smith*; that name appears indorſed upon it, and alſo that of *Robert Fleming*. The plaintiff ſues as indorſee of *Robert Fleming*, and alſo declares upon the indorſement by *James Smith*. He proved the acceptance of the defendant, and the indorſement by *Robert Fleming*; but he could give no evidence of *James Smith*'s indorſement, and it would be ſtrange if he did, for the defendant admits that there was no ſuch perſon. What is the defence? ſays the defendant, *James Smith*'s hand-writing is not proved, which I admit to be impoſſible to be proved, for there is no ſuch perſon.—There is another circumſtance: the bill is admitted to have been negociated by the drawer, ſo that he was the perſon who handed it over with the name *James Smith* upon it, to another perſon of the ſame name with the drawer, who indorſed it to the plaintiff. Suppoſe then, that *Fuller* pays it; can he be injured? Can *Robert Fleming* call on him? No; he has

1788.

Dixon *againſt* Fuller.

parted with his property in the bill. Can *James Smith?* No; there is no ſuch perſon. Neither can *William Fleming* call on him; it is admitted that he alſo parted with his property in the bill. Again I'll ſuppoſe that there is ſuch a perſon as *James Smith*. If *Fuller* pays the bill, he muſt have it delivered up to him. So, upon the whole, I think the verdict ought not to be diſturbed. At the trial I was for nonſuiting the plaintiff, at firſt; but upon conſideration I directed an application for a new trial.

Per Cur. Motion for new trial refuſed without coſts †.

† Vide *Tatlock* and another, v. *Harris*, 3 Term. Rep. B. R. 174. *Collins* and others, v. *Emett. Hen. Black. Rep.* C. B. 313.

COCHRAN againſt SPILLAR. *Exchequer.*

Same day. Cochran *againſt* Spillar.

Statute 25 Geo. 3 ch. 34. § 108. which requires that actions againſt revenue officers ſhall be brought within three months after the cauſe of action, does not affect cauſes of action accrued before that ſeſſions.

TRESPASS *vi & armis* for taking three rolls of tobacco on the 1ſt of *Auguſt*, 1784. The plaintiff filed his declaration on the 8th of *November*, 1786. The defendant pleaded the general iſſue. Upon the trial it appeared, that the defendant acted in the capacity of a revenue officer in taking the tobacco; whereupon it was objected, on the part of the defendant, that the plaintiff's action was barred, not having been commenced within three months next after the cauſe of action accrued, according to 25 *Geo.* 3. c. 34. § 108. which enacts "That in caſe

caſe any action or ſuit ſhall be brought or commenced againſt any perſon or perſons for any matter or thing by him or them done or executed by virtue of, or in purſuance of this act, or any other act or acts heretofore made, or hereafter to be made, relating to his majeſty's revenue, ſuch action or ſuit ſhall be commenced within three months next after the alledged cauſe of action ſhall accrue, and ſhall be laid in the proper county, where ſuch alledged cauſe of action ſhall have ariſen or begun, and the defendant or defendants in ſuch action may plead the general iſſue and give this act and the ſpecial matter in evidence at any trial to be had thereon, and that the ſame was done in purſuance of and by the authority of this act, or ſome other act relating to his majeſty's revenue, &c." For the plaintiff it was anſwered that the act did not extend to cauſes of action which had accrued before the paſſing of it. The point being ſaved, the plaintiff had a verdict ſubject to the opinion of the court upon it.

1788. Cochran *againſt* Spillar.

Mr. *Burſton*, Mr. *Warren*, and Mr. *Jameſon* for the plaintiff—In this caſe the cauſe of action had accrued before the act paſſed, and the queſtion is whether the act extends to it, to deprive the plaintiff of his remedy. It is a clear principle in the conſtruction of ſtatutes, that they ſhall not have a retroſpect, unleſs ſuch an intention of the legiſlature manifeſtly appear. The words of this ſtatute extend only to ſubſequent cauſes of action; they are "ſuch action, &c. ſhall be commenced within three months next after the alledged cauſe of action ſhall accrue."

If

1788. Cochran *againſt* Spillar.

If its operation be extended one inſtant back, it muſt have taken away a man's remedy againſt a revenue officer for a treſpaſs however flagrant and oppreſſive, if committed one minute and three months before the paſſing of the act. And though a man had brought his action before the paſſing of the act, yet he would be barred by it, if he had not commenced his action within three months after the treſpaſs. But it is objected that we did not bring our action within three months after the paſſing of the act. How can that objection be ſupported on the words of the act? The queſtion is whether the ſtatute at all extends to antecedent cauſes of action. Suppoſe the action had been brought within three months after the act paſſed, would it ſatisfy any of the words of the act? Before this act there was no particular limitation of actions againſt revenue officers. The plaintiff might have brought his action at any time within ſix years. It cannot be *preſumed* that the act has a retroſpect to take away that right. *Gilmore* v. *executor* of *Shooter* * is in point. There the teſtator before the 24th of *June*, 1677, in conſideration of marriage promiſed by parol to give the plaintiff £2000, or leave him ſo much by his will, but died without having paid the money, or made any proviſion for the plaintiff by his will. The ſtatute of frauds enact, "that from and after the 24th day of *June*, 1677, no action ſhall be brought to charge any perſon upon any agreement made," (which in its full extent

* 2 *Mod.* 310. 2 *Jones*, 108. 1 *Vent.* 330. 2 *Show*, 16. 2 *Lev.* 227. S. C.

tent would have a retroſpect) " upon con- 1788.
ſideration of marriage unleſs the agreement
be in writing. But the court would not pre- Cochran *againſt* Spillar.
ſume that the act had a retroſpect to take away an action to which the plaintiff was then entitled; for if a will had been made before the ſaid 24th day of *June*, and the teſtator had died afterwards, yet the will had been good, tho' it had not been in purſuance of the ſtatute" † What makes that caſe the ſtronger for us, is that in the ſtatute of frauds, the words are negative " no action ſhall be brought" whereas in this ſtatute there are no negative words, it ſpeaks affirmatively; " the action ſhall be brought, &c." It is a maxim that a ſtatute made in the affirmative without any negative expreſs or implied doth not take away the common law. 4 *Bac. ab.* 641. So though 43 E. 3 c. 11. enacts that the pannel of aſſize ſhall be arrayed four days before the day of aſſize; yet if this is done two days before the day of aſſize, it is good; for two days were ſufficient at the common law. In the caſe of the King v. *Sparrow*, 2 *Stra.* 1123, an appointment of overſeers of the poor, after the time given by the ſtatute, was held good; and the court obſerved that there were no negative words, and, though it was a new law, yet againſt the juſtice and meaning of it, no negative ſhould be implied. But ſuppoſing that the ſtatute does extend to cauſes of action accrued before,

† According to the report in 2 *Show* 16, *Pollexfen*, counſel for the plaintiff, ſaid that this caſe of a will had been ſo held by the Judges at *Serjeant's Inn*. In *Serjeant* v. *Puntis Prec. Cha.* 77. the maſter of the rolls was of the ſame opinion; but being preſſed to have it tried at law, he directed accordingly. What became of that caſe afterwards, I have not been able to diſcover. V.

1788. Cochran *againſt* Spillar.

before, the defendant has not intitled himſelf to the benefit of the point. He ought to have pleaded the ſtatute, as is required in other caſes where the party means to rely on a bar provided for him by the legiſlature. If he had pleaded it, we might have replied new matter: we might have replied that a *capias quo minus* was ſued out within the three months, or a *ſubpæna*, and have tried the queſtion whether a *ſubpæna* would ſave the caſe out of the ſtatute. The words of the act, which enable the defendant to give the ſpecial matter in evidence, do not intitle him to make this point on the general iſſue; they only intitle him to ſhew that he acted as a revenue officer: as to the words "give this act in evidence" either they are nonſenſe, or, if they have any meaning, the defendant ought to produce the act, and give it in evidence from the parliament roll.

For the defendant, it was very ſlightly urged that this caſe came within the ſtatute; that the words, "done and executed," and "ſhall have ariſen," where the act directs the action to be brought in the proper county, gave it a retroſpective operation; that pleading a ſtatute of limitation was only neceſſary, where it contained exceptions; within which the plaintiff ought to have an opportunity of bringing his caſe.

The Court, (*Yelverton*, Lord Chief Baron, Barons *Hamilton* and *Metge*,) was of opinion that the act did not extend to rights of action accrued before; that to take away a common law veſted right, ſtrong and clear words were neceſſary; that the ſtatute not having ſpecified any time for the commencement of its operation,

1788.

Cochran *againſt* Spiller.

operation, took effect from the firſt day of the ſeſſions; that there were no words in it which could ſeem to give it an earlier operation, except the words "done or executed," but that they were capable of another reaſonable conſtruction, that is, "to be done or "executed"; that the words, "ſhall have "ariſen" &c. are not a mode of ſpeaking of the time then paſt, but mean that when an alledged cauſe of action ſhould thereafter ariſe, the action ſhould be brought in the proper county. The court ought not to be ingenious in conſtruing the act ſo as to make it work an argumentative wrong.

The Attorney General, of counſel for the defendant, declared his agreement with the opinion of the court, obſerving, that from the ſtatement made to him, he had conceived the cauſe of action aroſe ſubſequent to the ſtatute.

Per. Cur. Poſtea to the plaintiff.

Tueſday, 5th February.

CROCKET and another, againſt MONTGOMERY and others. *Exchequer.*

Crocket *againſt* Montgomery.

In treſpaſs for taking the plaintiff's turf, he is intitled to full coſts, tho' the damages be under 40 ſhillings.

IN treſpaſs, *vi et armis*, the plaintiffs complained that the defendants on, &c. at the turbary of *Plaiſter*, the turf of the plaintiffs, to the value of 20*l.* then and there being, with force and arms, &c. took, carried away, and deſtroyed. Upon not guilty pleaded, the plaintiff got a verdict with ten ſhillings damages.

1788. Crocket *againſt* Montgomery.

damages. Thereupon, he got his coſts taxed, amounting to 36*l.* and iſſued execution; which the defendant moved to ſet aſide, upon the ground that without a certificate the plaintiff was entitled to no more coſts than damages, theſe being under 40*s.* After argument, this motion ſtood for the opinion of the court till this day, when it was delivered by

Yelverton, Lord Chief Baron.—In this caſe we are of opinion, that the plaintiff is intitled to full coſts. Lord *Dacre* v. *Tebb*, 2 *Blac.* 1151, is in the very point. It is there laid down that where a treſpaſs is done to the perſonal property of the plaintiff, he is intitled to full coſts, tho' the damages are under 40*s.* Though, I confeſs, if it were *res integra*, the words of the *Engliſh* ſtatute, which are purſued in the only ſtatute that we have on the ſubject, † are ſo general and comprehenſive, that I ſhould think they extended to all actions of treſpaſs whatſoever.

Per Cur. Motion refuſed.

BOWERMAN

† The *Engliſh* Statutes, 21 *Jac.* 1. ch. 16. ſ. 6. relating to actions for ſlanderous words; 22 & 23. *Car.* 2. c. 9. which is held to extend only to actions of *treſpaſs quare clauſum fregit*, and aſſault and battery, notwithſtanding the words are "in *all actions of treſpaſs*, aſſault and battery, and *other perſonal actions*;" and 8 & 9 *W.* 3. ch. 11. ſ. 4. which enables the judge to entitle the plaintiff to his full coſts by certifying, at the trial, that the treſpaſs was wilful and malicious; are comprized in the *Iriſh* Statute 2 *Geo.* 1. ch. 11. ſ. 15, 16.

1788.

Monday 11th *February*.

Bowerman *againſt* Nettles.

A return of *Tardè* need not mention the time of the delivery of the writ to the ſheriff.

BOWERMAN againſt NETTLES. *Exchequer.*

MR. *Chatterton* moved to diſcharge an order upon the ſheriff to amend his return of *tardè* upon a writ of *fieri facias*, by inſerting the date of the delivery of the writ to him. He contended that it was not neceſſary for the ſheriff to mention the day of the delivery, and cited *Retorn. Brev.* 168. *Dalton's Sh.* 162. 163. *Dutton's*, 5. and *Impey's* 444. 511.

Yelverton, Ch. B.—The legality of the return depends upon the courſe of the court—I have applied to the officer, and he reports, that he never ſaw a return of *tardè* wherein the day of the delivery was mentioned. We order the date to be inſerted, in this caſe, to comply with the conſent of the parties. But, not to make it a precedent, let the former order be diſcharged.

Per. Cur. Order to amend diſcharged.

Same day.

Barry *againſt* Aherne.

Defendant on removing the cauſe by *habeas corpus* muſt put in bail according to the courſe of the court. The court will not give him leave to give bail before a judge of *aſſize*.

BARRY againſt AHERNE. *Exchequer.*

THE Plaintiff commenced his ſuit in the court below, at *Corke*. The defendant removed it by *habeas corpus*, and now Mr.

1788. Barry *againſt* Aherne.

Hoare moved on his behalf for leave to put in bail before the next going judge of aſſize, for the *Munſter* circuit.

Mr. *Chatterton contra.*—This is never done upon ſecond proceſs. By the notice of this motion we are delayed from having a *procedendo*, which ought to go, if bail at bar be not given within four days. Allowing this motion would delay us a trial.

Yelverton, Ch. B.—Here the plaintiff proceeded regularly in commencing his ſuit, and the defendant has removed it; then he muſt comply with the terms required.

Per Cur. Motion refuſed with coſts.

Tueſday 12th *February.*

Leſſee of COTTINGHAM againſt BURROUGHS.

Common Pleas.

In the Common Pleas, a trial at bar cannot be moved for on the laſt day of term.

BY a rule of the court of *Common Pleas*, a motion for a trial at bar cannot be made upon the laſt day of the term. There is not the ſame rule in the *Exchequer*. A ſimilar motion was made there this day, between the ſame parties. It was not objected to as having been made on the laſt day of term; but at the deſire of the court it ſtood over till the next term.

Exchequer.

Exchequer.

1788.
Thurſday 28 *February.*

Practice. Traverſer of an inquiſition muſt give ſecurity for coſts

PER *Yelverton*, Ch. B.—Upon getting leave to traverſe an inquiſition, the party applying muſt give ſecurity by recogizance for the payment of coſts, in caſe the event of the traverſe ſhould be againſt him.

Sir MATTHEW BLACKISTON, cuſtodee, againſt ROCHFORT.

Same day.

Unleſs it appears to the court that the ordinary proceſs has been inſufficient to make the tenants pay their rents, the court will not give leave to diſtrain or eject them.

THE Attorney General on behalf of the cuſtodee, moved for liberty to diſtrain the tenants, or to bring ejectments for non-payment of rent, in the name of the outlaw; upon the outlaw's conſent and that of the Attorney General. He ſuggeſted that this was moved and conſented to becauſe the ordinary proceſs of the court was found inſufficient to oblige the tenants to pay their rents. But this not appearing from affidavits, the court refuſed the motion.

LYNCH.

1788.

Same day.

LYNCH, cuſtodee, againſt BLAKE.

It is contempt of the court of Exchequer to bring an ejectment for *cuſtodiam* lands, except in that court and by its leave. So is it a contempt to take any ſtep to affect the lands without leave, as long as the *cuſtodiam* ſubſiſts, though the outlaw be dead.

THE Attorney General obtained a conditional rule (without previous notice) to attach one *Taylor*, for bringing an ejectment in the court of *Common Pleas*, for the lands granted in *cuſtodiam*.

Mr. *Finucane* objected that it was not uſual to make a conditional rule for an attachment, without notice of the motion. But the officer reported the conſtant practice to be ſo.

The motion being afterwards gone into, the court allowed the cauſe, upon *Taylor's* attorney's undertaking to diſcontinue the ejectment and pay the coſts. The Ch. B. repeated what he had ſaid in *Sweet*, & *ux'* *cuſtodees* v. *Auſtin*, *antea*, 306. and added, that it was decided by this court when full, in his immediate predeceſſor's (Lord Ch. B. *Burgh's*) time, that though the outlaw be dead, yet as long as the *cuſtodiam* ſubſiſts, it is a contempt of this court to take any ſtep to affect the lands without leave of the court.

Same day.

MAHON cuſtodee, againſt KEOGH.

The declared tenant to *cuſtodiam* lands, at a ſetting under an order of the court, neglecting to take out leaſes, &c. proceeded againſt as for a contempt.

MR. *Finucane*, on behalf of the cuſtodee, moved to ſet aſide a ſetting of the lands, which had been had under an order of the court, the higheſt bidder and declared

1788.

Mahon cuſtodee *againſt.* Keogh.

clared tenant not having taken out leaſes and given ſecurity by recognizance for the rent.

Yelverton, Ch. B.—Take a conditional rule, and alſo to ſhew cauſe why he ſhould not be attached. It is like the caſe of a bidder at a ſale under a decree, who has not made a depoſit and completed his purchaſe.

At a ſetting of *cuſtodiam* lands, under an order, no perſon is to be declared tenant, but an attorney of the court, or a perſon certified by ſuch attorney, to be ſolvent, and for whom he is to be reſponſible.

Thurſday 18th *December*, 1788. The court of *Exchequer* made the following order:—"The court taking into conſideration the many inconveniences which have ariſen from fictitious and inſolvent perſons appearing to bid, and being duly declared tenants to lands granted in *cuſtodiam*, upon the ſetting of ſuch lands by the order of the court, ORDERED, that no perſon ſhall be declared tenant in ſuch caſe who ſhall not be an attorney of the court, or certified by an attorney of the court, to be ſolvent, and for whom ſuch attorney ſhall be reſponſible."

MAHON, cuſtodee, againſt ODLUM.

Same day.

Cuſtodiam diſſolved, the outlaws intereſt having been evicted for nonpayment of rent.

THE landlord of whom *Odlum* held the lands granted in *cuſtodiam*, had brought an ejectment with the leave of the court, for nonpayment of rent, had gotten execution, and the ſix months were expired. Mr. *Whiteſtone*, on his behalf, moved to diſſolve the *cuſtodiam*. Motion granted, on reading the affidavit of ſervice; the Chief Baron however obſerving,

1788. obſerving, that the motion was a ſtrange one.*

* *Ante* 317. A ſimilar motion held unneceſſary.

Friday 29th *February*.

WARD, cuſtodee, againſt MOONY.

It is no contempt to diſtrain before the ſervice of the order on the tenants to pay their rents to the cuſtodee, tho' after the grant in *cuſtodiam*.

AFTER the grant in *cuſtodiam*, a third perſon in right of his wife, a jointreſs, diſtrained the lands without leave of the court. The tenant diſtrained thereupon obtained a conditional order for an attachment. Upon ſhewing cauſe, Mr. *Finucane* objected that the tenant did not ſwear that before the diſtreſs he had been ſerved with the order to pay his rent to the cuſtodee.

Yelverton, Ch. B.—Allow the cauſe. The order on the tenant attaches only the rent due at the time of the ſervice of it and after; and it is no contempt to diſtrain the tenant before the ſervice of the order. No one is thereby injured. It is the fault of the cuſtodee that he did not ſerve the order ſooner.

Same day.

CROSS, cuſtodee, againſt JOHN COLSON.

The outlaw or the heir and tertenant are the only perſons who can apply to remove the king's hands.

MR. *Jameſon*, on behalf of *James Colſon*, moved to diſſolve the *cuſtodiam*, upon a certificate of the reverſal of the outlawry.

Mr.

1788.

Croſs, cuſtodee *againſt* Odlum.

Mr. *Sheridan contra.* It does not appear what intereſt *James Colſon* has in the lands.

Yelverton, Ch. B.—Therefore refuſe the motion with coſts. If you were intitled to diſſolve the *cuſtodiam*, it is of courſe to do it in the office on paying the coſt. The outlaw himſelf, or the heir and tertenant are the only perſons who can apply to remove the king's hands.

Same againſt ſame.

Same day.

MR. *Jameſon*, on behalf of *James Colſon*, ſhewed for cauſe againſt an attachment for not paying his rent to the cuſtodee, that the cuſtodee had proceeded to outlawry after the defendant had left the kingdom and gone to America. If the cuſtodee ſhould receive the rent, he will have no right to retain it. Will the court turn the landlord and his tenants round to an action againſt him for money had and received, or to a bill in equity?

It is no cauſe againſt an attachment for not paying rent to the cuſtodee, that he proceeded to outlawry after the defendant had gone abroad.

Yelverton, Ch. B.—Diſallow the cauſe with coſts.

End of Hilary Term.

1788.

HOUSE OF LORDS,

Thurſday, 20th March, 1788.

Reeves *againſt* Devonſher and others.

EDWARD HOARE REEVES, Eſq. and MARY REEVES, otherwiſe DEVONSHER, his wife, executrix of ABRAHAM DEVONSHER; appellants.

RICHARD DEVONSHER NEWENHAM, Eſq. SAMUEL PENROSE and MARY his wife; WILLIAM PENROSE and MARGARET his wife; and JOHN DEVONSHER, otherwiſe NEWENHAM, Eſq. an infant, by JOHN VEREKER, his next friend; reſpondents.

In this caſe the Lords thought that the teſtator had in his will and codicils, clearly ſhewn his intent to exempt his perſonal eſtate from his judgment and ſpecialty debts, and therefore reverſed the decree of the court of Exchequer, and decreed them a charge on the deſcended lands, in exoneration of thoſe deviſed. And the teſtator having by his will deviſed all his lands to A. ſubject to an anunity for his wife and afterwards by a codicil deviſed part of thoſe lands to B and C, confirming all his deviſes and bequeſts in favour of his wife, the Lords held that ſhe ought not to be injoined from reſorting to this part for her annuity, and reverſed the decretal order of the *Exchequer* for an injunction.—Parol evidence is not admiſſible, to ſhew that teſtator intended to exempt his perſonal eſtate.

THE appellants having brought an appeal from the decretal orders made by the court of *Exchequer* on the 17th of *July* 1787, and 4th of *February* 1788, (*vide ante* 319.) the cauſe was argued by the Attorney General and Mr. *Duquery*, for the appellants; and by the Solicitor General and Mr. *M. Smith*, for the reſpondents, on the 14th, 17th, 19th, and 20th of *March*, 1788, when the decree of the court of *Exchequer*, was reverſed.

Lord

1788. House of Lords. Reeves *againſt* Devonſher and others.

Lord *Earlsfort*—This appeal is brought from a decree of the court of Exchequer, which depends on the will and two codicils executed by *Abraham Devonſher*. I think, when taken together, they will be very eaſily underſtood, and that your Lordſhips will be ſatisfied that the decree ought to be reverſed. The grounds of my opinion are theſe:—By the will of *Abraham Devonſher*, in which his wife was the principal object, he directs that ſhe ſhall have an annuity of 600*l.* if ſhe ſhould chooſe to releaſe a jointure of 200*l. per ann.* which had been made on her by ſettlement; but, if ſhe ſhould chooſe to retain it, that ſhe ſhould, in addition to the 200*l. per ann.* have an annuity of 400*l.* and thus, in the outſet of the will he ſhews a mark of his preference, by giving her her option which of the two to take. In the latter part of the will he ſays, "And if the reſidue of my perſonal eſtate ſhould not be ſufficient to pay my debts and legacies, then I will and direct that any part of my real eſtate in the city and liberties of *Corke*, or in *Muſkerry*, which my truſtees ſhall think proper, be ſold by them, and the purchaſe money paid to my executors for that purpoſe; and laſtly, I appoint my ſaid wife to be my ſole executrix and reſiduary legatee."—Next comes the codicil of the 14th *October* 1781, by which the teſtator recites the death of his brother *James*, and deviſes to his wife certain lands therein mentioned during her widowhood, and confirms the ſeveral deviſes and bequeſts made to her by the will, and charges all his lands excepting thoſe deviſed to his wife, with 1000*l.* for his

1788. House of Lords. Reeves *againſt* Devonſher and others.

grand-niece, *Harriot Newenham*, and concludes with theſe words "all which lands are "to be free from all incumbrances, and I "charge and incumber all my real and free-"hold eſtates, except the lands before named "in this codicil, with all debts I owe by "bond, judgment, or other ſpecialty, and "direct that my executrix ſhall pay my ſim-"ple contract debts and arrears of rent out "of my perſonal eſtate."—The next inſtrument is the ſecond codicil, which is dated the 20th of *April*, 1783; by it he deviſes two denominations of lands to his two nieces, *Mary* and *Margaret Penroſe*, otherwiſe *Randall*, and confirms "all the deviſes and bequeſts men-"tioned in his will, and firſt codicil, in fa-"vour of his wife."—The decretal order of the court of *Exchequer* is; that the perſonal eſtate of *Abraham Devonſher*, ſhould be ſubject to, and not exempted from the payment of the debts of *Abraham Devonſher*, and that an account ſhould be taken of the perſonal eſtate, and of the debts, funeral expences, and legacies. On the 4th of *February*, 1788, on a rehearing, it was directed, that the former decree ſhould be amended, by decreeing an injunction to iſſue to reſtrain the appellants from reſorting to the lands deviſed by the ſecond codicil, for the payment of the appellant *Mary*'s annuity of 600*l.*

In the argument of this caſe, three queſtions have been made. It was inſiſted on, on the part of the appellants, that the evidence of *Robert Reeves* ought to have been admitted; that is, parol evidence in explanation of a will. But it is not neceſſary for me to give any opinion on that point, becauſe I think the caſe is ſtrong enough without that evidence

1788.
House of Lords.
Reeves *againſt* Devonſher and others.

evidence, in favour of the party who ſeeks to offer it. But, if it were neceſſary to decide on that queſtion, I ſhould be inclined to think the court of *Exchequer* judged right in refuſing it, from the great danger of admitting parol evidence to rebut what the appellants call an equity, in direct contradiction to the ſtatute of frauds.

The cafe, then, is reduced to two points—1ſt, whether the real eſtate ſhall be diſcharged from all debts, as well by judgment and ſpecialty, as by ſimple contract.—2dly, Whether the eſtates deviſed to the *Penroſes* ſhall be exempted from the payment of the annuity of 600*l.* deviſed to the appellant *Mary*.—The court of *Exchequer* decreed the affimative of both of theſe queſtions; and I do not think that that decree was well founded in either of them.

In the conſtruing of wills, the leading rule is, that the intent of the teſtator ſhould be obſerved; and in this will and codicils taken together, I think it is very plain.—Another rule is, that no part of the will to which meaning or operation can be given ſhall be rejected. If the decree of the *Exchequer* were to remain, theſe words "and I "direct that my executrix ſhall pay my ſim-"ple contract debts, and arrears of rent "out of my perſonal eſtate;" would be inoperative. But I conſider them as having this meaning,—"that ſhe ſhall pay my ſim-"ple contract debts, and arrears of rent, "*and them only*, out of my perſonal eſtate, "and my judgment and ſpecialty debts only "ſhall be paid out of my real eſtates."—The teſtators wife was the grand object of the firſt codicil. His ſituation in life had been improved

1788. House of Lords. Reeves *againſt* Devonſher and others.

improved ſince he made his will, and he intended that his wife's ſhould alſo. For that purpoſe, he does what any man of common underſtanding would do; he directs that thoſe who ſhould get his real eſtate, ſhould pay his judgment and ſpecialty debts, to which it was naturally liable. In this particular the court of *Exchequer* have erred by taking from the reſiduary legatee to pay the ſpecialties; whereas ſhe was only liable to pay the ſimple contract debts. The court have alſo ordered an account to be taken of the perſonal eſtate, and none of the real; and as every obſtacle which ſtands in the way of juſtice ſhould be removed, I think an account ſhould be taken of the real, and not of the perſonal, for none of the ſimple contract creditors were before the court, nor was there any demand made by them againſt it. It would, therefore, be running the widow into a needleſs expence to decree a long account of the perſonal eſtate, if you think the perſonal eſtate diſcharged; but, if you think the perſonal eſtate liable to all the debts, that direction was right, and there ſhould not be an account of the realty.

As to the order in which the real eſtates ſhould be made liable, the deviſed eſtates certainly are not to be reſorted to until the deſcended eſtates ſhall have been all ſpent.

As to the injunction which was directed to iſſue, on the amendment of the decree. I think it would be a great injuſtice to let it ſtand. *Abraham Devonſher* has charged his intire real eſtate with an annuity for his wife. Every inſtant he manifeſts his regard to her; and in the ſecond codicil, he confirms to her all

1788.
House of Lords.
Reeves *againſt* Devonſher and others.

all the deviſes and bequeſts mentioned in his will and firſt codicil. One of them was, that ſhe ſhould be at liberty to reſort to the lands deviſed by the ſecond codicil, with the reſt of his real eſtates, for the payment of her annuity. And it was well ſaid by Mr. *Duquery*, that though the reſt of the lands may be at preſent ſufficient to pay it, they may not be always ſo. They may be recovered by title paramount. Beſides it may be more convenient to the widow to reſort to thoſe particular lands, than any other; and, therefore, there ought not to be an injunction to deprive her of this convenience which the teſtator meant to give her.

I therefore move that the decree of the court of *Exchequer* may be reverſed, it being the opinion of the houſe, that the perſonal eſtate of *Abraham Devonſher* is exempted from the payment of all debts by judgment, bond, or other ſpecialty, and that ſuch debts are charged on the real and freehold eſtates; and that the deſcended eſtates ſhould be firſt applied in diſcharge of thoſe debts; and if they ſhould not be ſufficient, then the deviſed eſtates which are not ſpecifically diſencumbered; and alſo, that the order for iſſuing an injunction be reverſed; and that an account be taken of the real and freehold eſtates, ſpecifying which were deviſed, and which deſcended, and in whoſe hands they have come; and alſo, an account of the debts by judgment, bond, or other ſpecialty.

Lord *Chancellor*.—I concur in thinking that the decretal order made by the court of *Exchequer* on the 17th of *July*, 1787, and on the

1788. House of Lords.

Reeves *againſt* Devonſher and others.

the 4th of *February*, 1788, ſhould be reverſed.

The perſonal eſtate is liable in the firſt inſtance to pay all the debts of the teſtator, by the rules of equity, and by this will of *Abraham Devonſher* is expreſsy made ſo. For by it he ſays, "If the reſidue of my perſonal "eſtate be not ſufficient to pay my debts and "legacies, then I direct that part of my real "eſtate in *Corke*, or in *Muſkerry* ſhall be "ſold for that purpoſe." That is as much as if he had ſaid, thoſe parts of my real eſtate ſhall not be applied until my perſonal property ſhall have been found inſufficient; ſo that in the will every thing is clear and explicit. After the making of the will, which was in *September*, 1777, *James Devonſher*, the brother of the teſtator died, and by his death a conſiderable acceſſion of both real and perſonal eſtate came to *Abraham*. He was in much greater affluence than he was 1777. In the *October* after his brother's death, in 1781, he conſidered what he had by his will done for his wife; and probably thought that by making her reſiduary legatee, he had given her little or nothing; but ſaid, as I am now grown richer, the reſiduary bequeſt ſhall be worth ſomething; and then he made the firſt codicil, by which he ſays, "I charge and in-"cumber all my real and freehold eſtates "with all debts I owe by bond, judgment, or "other ſpecialty, *and*" (he ſays, though perhaps it would have been more properly expreſſed if he had ſaid "but") "I direct "that my executrix ſhall pay my ſimple con-"tract debts and arrears of rent out of my "perſonal

1788.
House of Lords.
Reeves *againſt* Devonſher and others.

"perſonal eſtate." This codicil introduces the queſtion which brings this caſe before your Lordſhips. The court of *Exchequer* thought that theſe words were not ſufficient to diſcharge the perſonal eſtate. Several rules have been mentioned at the bar; but they may all be reſolved to this ſingly—That the perſonal eſtate, being primarily liable to the payment of all the debts of the deceaſed, muſt remain liable in equity, as at law, unleſs it appear to be the intent of the teſtator that it ſhould be diſcharged; but if it be ſo clear, that no doubt can remain on the judge's mind; if, by looking on and well conſidering the will, he is ſatisfied that it was the intent of the teſtator to exonerate the perſonalty, he is bound to give it that conſtruction. I think clearly it was the intent of the teſtator, in this will, to exonerate the perſonalty from the payment of his judgment and ſpecialty debts; therefore, there is no occaſion to agitate the other queſtion concerning the admiſſibility of the evidence of *Robert Reeves*. But if there were any doubt as to the firſt point that I have mentioned, the queſtion concerning that evidence would be, whether we ſhould admit parol evidence to clear up any doubtful matter appearing in the will? But on this I give no opinion, for I think there is no doubt on the face of the will, that the teſtator intended to diſcharge the perſonal property of his judgment debts and ſpecialties.

The next queſtion is,—Whether the eſtates deviſed to the *Penroſes* ſhould be diſcharged of the wife's annuity?—The wife appears all along to have been the object of the teſtator's bounty,

1788. House of Lords. Reeves *againſt* Devonſher and others.

bounty, and when he makes his ſecond codicil, he confirms all the deviſes and bequeſts he had before made in favour of his wife; which is as much as to ſay, Though I deviſe theſe lands to different perſons from thoſe to whom I had before deviſed them; yet I do not mean that ſuch variation in the diſpoſition of them ſhould affect my wife. I therefore think that the order for iſſuing the injunction ſhould be reverſed alſo.

Lord *Pery*.—I concur intirely in opinion with the two learned Viſcounts.—The firſt queſtion is—Whether the perſonal eſtate bequeathed to the wife ſhall be diſcharged from the payment of the ſpecialties. The ſecond is—Whether the widow ſhall be reſtrained from reſorting to the lands deviſed to the *Penroſes*; which ſecond point I ſhall conſider firſt. It ariſes concerning the lands which are the ſubject of the ſecond codicil. It is admitted that thoſe lands were with others charged with the payment of the 600*l.* annuity to the teſtator's widow. Then the queſtion is, has the teſtator by this ſecond codicil diſcharged thoſe lands. It is ſaid, that by the deviſe to his two nieces, of thoſe lands, there is a revocation of the will *pro tanto*. So I allow—as far as the deviſe goes to give the lands to different perſons from thoſe to whom they were deviſed by the will. But he adds to the deviſe, "and I confirm all my deviſes and "bequeſts mentioned in my will and codicil "in favour of my wife." So far as concerns any favour ſhewn to the wife, it is not a revocation of the will, but a confirmation. There is no doubt the teſtator had it in his power to revoke part of his will, and to confirm part. Conſequently,

1788.
House of Lords.
Reeves *against* Devonsher and others.

Consequently, if it could be considered that the general devise of those lands had revoked the will in every particular concerning them, and discharged them from the payment of the wife's annuity, these last words set up that charge again. But the will and codicils are all to be taken together as one act, and as if made at the same time; as, if by a will one devise all his estates to a particular person, and afterwards acquire another estate, and if by a codicil he bequeath his personal estate, and take no notice of the real estate; if the codicil be attested in the manner directed by the statute, to pass a real estate, it is a republication of the will, and the intermediately acquired lands will pass by the general devise in the will. Suppose the value of the other lands reduced, or the title to them evicted, will you take from the wife her right to resort to those devised by the second codicil? If you restrain her from resorting to those lands, you do not confirm all the bequests in favour of the wife.

The other point is—Whether the personal estate shall be exonerated from the payment of the judgment and specialty debts. Parol evidence has been offered to clear up the doubts that arise in the first codicil. Though it be not absolutely necessary to consider whether that evidence be admissible, yet I think I am called on to give my opinion; and I think it ought not to be received. It is said that parol evidence may be admitted to rebut an equity arising on the will, and several cases have been cited where that doctrine was held. That matter had been carried great lengths, and threatened to let in all the mischiefs

1788. House of Lords.

Reeves *againſt* Devonſher and others.

chiefs that were intended to be prevented by the ſtatute of frauds. It received a conſiderable check by the caſe of *Selwyn* and *Brown*. Since that there has ſcarcely been an inſtance of it. But admitting that parol evidence may be received to rebut an equity—what ſort of equity? It is that which from the conſtruction of a will, and the intent of the party, ariſes by the rules of equity contrary to the rules of law; as the caſe put by the Solicitor General, where a man having a perſonal eſtate, makes a will, and appoints an executor. By the appointment of the executor, by the rules of law, he gives the reſidue to him. But if the teſtator bequeath a particular part to him, equity raiſes a preſumption that he did not mean that the executor ſhould have the whole. In order to rebut that equity, parol evidence has been allowed, becauſe the rules of equity militated againſt that of the law, which would give the whole reſidue to the executor. But how does that apply to the preſent caſe? According to the rules of law, all the debts are primarily chargeable on the perſonal eſtate, and there is no equity which contradicts it. Therefore it is not to rebut an equity that the evidence is offered, which is argued as the ground for admitting it. No; it is to give a conſtruction contrary to the general rule, both of law and equity, and not to rebut an equity contrary to the rule of law. I therefore think the court of *Exchequer* was right in refuſing to admit the evidence.

As to the queſtion—Whether the perſonalty is to be exonerated from the payment of the debts, excepting the ſimple contract debts and

1788.
House of Lords.
Reeves *againſt* Devonſher and others.

and arrears of rent. It is admitted that it is not neceſſary that there ſhould be expreſs words to diſcharge the perſonal eſtate; that the intent of the teſtator is ſufficient, if it can be collected from the will: not indeed as againſt creditors, but againſt the heir at law, or deviſee. What is the conſtruction of the firſt codicil? Let any man of common ſenſe read it, and think what it can mean. He can form as good a judgment of it, as the ableſt lawyer. Take the codicil by itſelf. Was not the teſtator ſhewing his attachment to his wife? He had gotten an addition to his fortune, and therefore he directs that all his real eſtate ſhall be charged with his ſpecialty debts, and in the ſame breath directs that his perſonalty ſhall be charged with thoſe by ſimple contract. Would not any one ſay; he has made two funds for the payment of the different kind of debts, and one ſhall not be ſuffered to run in upon the other? But connect the codicil with the will. By that he had made his perſonal eſtate liable to all his debts, and gave an auxiliary fund in caſe it ſhould not be ſufficient. But when he had gotten an increaſe of property, he then by the codicil revokes that part of the will by which he had made his perſonal eſtate liable to all his debts; and, inſtead of that, makes it ſubject only to the ſimple contract debts, and arrears of rent. It is like the caſe put by Mr. *Duquery* of *Walker* v. *Jackſon*, * where a man had made his will, and a year afterwards, in his own hand, wrote, "And I give and deviſe "to them" (whom he had made his executrixes)

* 1 *Wils.* 24. 2 *Atk.* 624.

1788. House of Lords. Reeves *againſt* Devonſher and others.

trixes) " all my perſonal eſtate not herein be-
" fore deviſed," and then executed his will again, in the preſence of three witneſſes. Lord *Hardwicke* ſaid, this is infinitely ſtronger than if he had originally made that part of his will.—Therefore I have not a doubt that the intent of the teſtator was to exempt the perſonalty from the ſpecialty debts. Conſequently, I think that that part of the decree ſhould be reverſed.

The court of *Exchequer* by decreeing the perſonalty liable, were not under the neceſſity of ſaying any thing as to the deſcended or deviſed eſtates. They, therefore, went no farther than to order an account to be taken of the perſonal eſtate, as they thought that was ſufficient. But if your Lordſhips be of opinion that the perſonal eſtate is not liable, it will be neceſſary for you to direct out of what fund the ſpecialty debts ſhall be paid. The deciſion of *Galton* v. *Handcock*, * has never been ſhaken. It was almoſt exactly in point. I therefore think that the ſpecialty debts ſhould be charged in the firſt place on the lands deſcended. Though this queſtion has not been touched on by the court of *Exchequer*, and though perhaps it may be thought premature to make any order as to it, until that court ſhall have made a decree upon it, I nevertheleſs think it proper that the decree of this houſe ſhould embrace that part of the caſe; for the original bill had prayed that the judgment and ſpecialty debts ſhould be decreed a charge on the deſcended eſtates, and the croſs bill alſo prayed that an account of the

* 2 *Atk.* 424. 427. 430.

1788.
House of Lords.
Reeves *againſt* Devonſher and others.

the debts might be taken, and that they might be paid in ſuch order, and out of ſuch fund as the court ſhould think proper. As the court of *Exchequer* ought to have decreed that the judgment and ſpecialty debts ſhould be paid out of the real eſtate, ſo ſhould they have decreed out of what part of it they ſhould be paid. As they have omited to do that, we are bound to ſupply it; for if the court below have not made a proper decree it is the duty of your Lordſhips, as a court of appeal, to decree every thing which the inferior court ought to have done.

ORDERED and ADJUDGED, that the order or decree of the court of *Exchequer* of the 17th day of *July*, 1787, be reverſed, it being the opinion of this houſe, and ſo by this houſe adjudged, that the perſonal eſtate of the ſaid *Abraham Devonſher* is exempt from the payment of all debts of the ſaid *Abraham*, by bond, judgment, or other ſpecialty, and that ſuch debts by bond, judgment, or other ſpecialty of the ſaid *Abraham Devonſher*, are a charge upon his real and freehold eſtate, and ought to be paid out of the ſame, in manner following, *viz*:—Out of the real and freehold eſtates deſcended from the ſaid *Abraham Devonſher* to and upon his heirs at law; and in caſe of any deficiency therein, out of his real and freehold eſtates deviſed, and not expreſsly diſcharged thereform by the ſaid *Abraham*, by his will and codicils, or one of them. And it is hereby alſo ORDERED and ADJUDGED, that the ſaid order or decree of the ſaid court, of the 4th day of *February* laſt, ordering and decreeing that the former decree ſhould be amended by decreeing an injunction

1788. House of Lords. Reeves *againſt* Devonſher and others.

injunction to iſſue to reſtrain the appellant *Mary*, from reſorting to the lands of *Shandangan*, *Farranſheſſary*, and *Labane*, or any part thereof for payment of the appellant *Mary*'s annuity of 600*l.* in the pleadings mentioned, or any part thereof, be alſo reverſed. And it is hereby further ordered, that an account be taken by the chief remembrancer of the ſaid court, or his deputy, of the real and freehold eſtates of the ſaid *Abraham Devonſher*, of which he died ſeiſed, and of what the ſame did or doth conſiſt, and the values thereof reſpectively; and that he do in his report diſtinguiſh the real and freehold eſtate deviſed by the will and codicils of the ſaid teſtator, and the lands of which the ſaid *Abraham* died ſeiſed, not compriſed in his ſaid will and codicils, and which deſcended to his heirs at law; and that the ſaid chief remembrancer, or his deputy do inquire and ſet forth into whoſe hands the ſaid real and freehold eſtates have come, and in whoſe hands they now are; and that he do alſo take an account of the debts due by the ſaid *Abraham Devonſher* by bond, judgment, or other ſpecialty. And it is hereby further ordered that, ſubject to the ſaid judgment and orders of this houſe as aforeſaid, the ſaid cauſe be remitted back to the ſaid court of *Exchequer* to proceed therein, and to do as ſhall be juſt.

Mem.

1788.

Davies against Reeves and Mary his wife.

Mem. It was mentioned in page 355 *antea*, that the lands deviſed by the ſecond codicil had been diſtrained. That diſtreſs occaſioned the caſe of *Davies* v. *Reeves* et ux' in replevin, which came before the court of B. R. *Hil.* 1786, upon a ſpecial demurrer to the avowry. On *Tueſday*, 7th of *February*, 1786, judgment was given for the avowants. Lord *Earlsfort*—We all think this as clear a caſe as any that has come before the court. The mere reading of the avowry will anſwer many of the objections. It ſtates, that *A. Devonſher*, being ſeiſed in his demeſne as of fee of the lands of *Labane*, &c. "duly made and publiſhed his laſt will and teſtament in "writing," and therein, (after reciting that he had by deed dated on or about the 7th day of *December*, then laſt paſt, charged the lands in ſaid recited deed mentioned, with an annuity or jointure of 200*l.* for the ſaid *Mary*,) he deviſed to the ſaid *Mary*, one annuity, or yearly rent charge of 600*l.* in caſe the ſaid *Mary* ſhould chooſe to releaſe the ſaid recited charge, or jointure of 200*l.* but if ſhe ſhould chooſe to retain it, then he deviſed to her one annuity, or yearly rent charge of 400*l.* to make up 600*l.* in the whole. Such 600*l.* or 400*l.* to be payable by four quarterly payments in every year during her life; the firſt quarter to commence on the day of his death, with a clauſe of diſtreſs; but ſo as that none of the tenants ſhould be diſtrained for more than the particular rent payable by each. The avowry then ſtates, that *A. D.* died ſeiſed of the ſaid lands, on the 22d of *April*, 1783, without revoking his ſaid will. That afterwards and before the ſaid time, when, &c. and before the marriage of the ſaid *Edward* and *Mary*, (the avowants,) to wit. on, &c. at, &c. the ſaid *Mary* releaſed ſaid yearly charge, or ſum of 200*l.* and elected to have and receive the ſaid annuity, or yearly rent charge of 600*l.* By virtue whereof the ſaid *Mary* became ſeiſed for the term of her natural life of the ſaid annuity, or rent charge of 600*l.* iſſuing out of the ſaid lands in which, &c. That the ſaid *George Davies*, (the plaintiff) was at the time when, &c. and now is tenant of the ſaid lands of *Labane*, in which, &c. and that the rent payable by him thereout was at the time when, &c. and now is 294*l.* by the year; and becauſe the ſum of 294*l.* part of 300*l.* of ſaid annuity, or rent charge of 600*l.* for two quarters of a year ended the 22d day of *October*, 1784, were in arrear and unpaid, (the reſidue

In pleading a deviſe it is ſufficient to ſtate that teſtator "duly made & publiſhed his laſt will and teſtament in writing" without ſtating the ſolemnities required by the ſtatute of frauds. An avowry for a rent-charge need not aver that at the time of the grant the lands were not in leaſe. The court will not preſume that they were. If they were, it ought to be pleaded in bar.

1788.

Davies *againſt* Reeves and Mary his wife.

of ſaid 300*l.* having been paid to the ſaid *E.* and *M.*) and which ſaid ſum of 294*l.* is the rent payable by the *G. D.* out of the ſaid lands of *Labane*, in which, &c. the ſaid *E.* and *M.* well avow, &c.—There are three cauſes of demurrer to this, ſpecially aſſigned. Firſt, That it is not alledged that the will of the ſaid *A. D.* was made and atteſted as by law is required. Secondly, That it is not alledged how the ſaid *Mary* releaſed the ſaid yearly rent charge of 200*l.* or elected to have and receive the rent charge of 600*l.* ſo as that any iſſue can be taken thereupon. Thirdly, That it is not alledged how the ſaid *George Davies* was, or is tenant to the ſaid lands of *Labane*, or when the ſaid rent of 294*l.* was payable. As to the firſt cauſe—Suppoſing that the avowants ought to have ſtated that the will was executed with the ſolemnities required by the ſtatute of frauds, particularly mentioning them, the cauſe of demurrer is not well ſet out; for it only ſuggeſts in general, that it is not alledged that the will was made and atteſted as by law is required. But the ſubſtantial anſwer is, that theſe facts might have come out on the iſſue *deviſavit vel non.* The plaintiff might have pleaded, that *A. D.* did not deviſe. As to the ſecond cauſe. It is nothing to the tenant how ſhe releaſed. She has ſaid that ſhe releaſed, upon which iſſue might have been have taken. As to the third. It was the plaintiff's buſineſs to ſhew that nothing was due by him. It has alſo been objected that a rent-charge is not grantable out of a rent. Anſwer; that is not in the caſe. We are not to preſume that the lands were in leaſe. If they were, the plaintiff ought to have brought it out by pleading. He ought to have ſhewn that he claimed paramount to the rent-charge. It is objected alſo, that ſhe has not ſet out her title deeds. Anſwer; the will is her title deed. But it is ſaid, that the releaſe is not ſet out. Anſwer; ſhe need not have ſet it out. What was that to the tenant; beſides, the releaſe was to go to the releaſee. It was objected too, that the plaintiff's leaſe was not ſet out. Anſwer; it was his buſineſs to plead it, if it afforded any matter in bar of the avowry. Secondly, The law does not ſuppoſe the leaſe to be in her poſſeſſion.

Per Cur. Demurrer unanimouſly over-ruled with coſts.

EASTER

1788.

EASTER TERM,

Saturday, 19th *April.*

28 Geo. III.

Ex parte DALY.—In Chancery.

Ex parte Daly.

Upon an application to the Chancellor to withhold the great ſeal from a patent, he will only conſider whether it is legal or not; not whether the crown ought to grant it or not.

THIS was a petition by Mr. *Daly*, manager and proprietor of the Theatre Royal, *Dublin*, to the Lord Chancellor, praying him to withhold the great ſeal from a patent profeſſing to have been granted by the crown under the powers veſted in it by 26 *Geo.* 3. *ch.* 57. and authorizing Mr. *Aſtley* to have a theatre for exhibiting during certain months of the year, feats of horſemanſhip, and muſical pieces, (provided they are not ſuch as have been heretofore exhibited at the *Theatre Royal*) dancing, tumbling, and pantomimes of what nature and kind ſoever, not profane or obnoxious: with a proviſo againſt his exhibiting any regular tragedy, comedy, opera, play, or farce. *Daly*, in *November*, 1786, had obtained a patent for the *Theatre Royal*, and now oppoſed the paſſing of *Aſtley's* patent upon the ground of the great prejudice it would be to him, after the expence he had been at in fitting up and ſupporting the theatre. At the bar, it was rather ſuggeſted by counſel againſt the petition to be the ground of the application, than relied on by

1788. *Ex parte* Daly.

the petitioner's counſel, that the crown had not power to grant divers patents for theatres, the words of the act being clear on that head, † and even in *Daly*'s patent, the clauſe forbidding others to keep theatres concludes with

† The words of the act are § 1. Whereas the eſtabliſhing a well regulated theatre in the city of *Dublin*, being the reſidence of the chief governor or governors of *Ireland*, will be productive of public advantage, and tend to improve the morals of the people: Be it therefore enacted, &c. That it ſhall and may be lawful, to and for his majeſty, his heirs and ſucceſſors, to grant under the great ſeal of this kingdom, for ſuch term not exceeding twenty one years, and under ſuch reſtrictions, conditions, and limitations as to him or them ſhall ſeem meet, from time to time, and when and as often as he or they ſhall think fit, one or more letters patent, to one or more perſon or perſons for exhibiting and keeping one or more well regulated theatre or theatres, play-houſe or play-houſes in the city of *Dublin*, and in the liberties, ſuburbs, and county thereof, and in the county of *Dublin*.—§ 2. No perſon or perſons ſhall for hire, gain, or any kind of reward whatſoever or howſoever, act, repreſent, or perform, or cauſe to be acted, repreſented, or performed, any interlude, tragedy, comedy, farce, pantomime, or any part or parts therein, on any ſtage, or in any theatre, houſe, booth, tent, or other place within the ſaid city of *Dublin*, or the liberties or ſuburbs, or county thereof or within the county of *Dublin*, under any colour or pretence whatſoever, ſave and except in ſuch theatre or play-houſe as ſhall be ſo eſtabliſhed or kept by letters patent as aforeſaid, under the penalty of forfeiting the ſum of 300*l.* ſterling for every ſuch offence, one moiety to be paid to the governors or guardians of the *Lying-in Hoſpital* or their known treaſurer for the time being, to be applied to the uſe of that charitable inſtitution, the other to the perſon or perſons who ſhall proſecute and ſue for the ſame, to be recovered by action of debt, bill, plaint, or information, in any of his majeſty's courts of record at the *Four Courts* in *Dublin*, in which no eſſoin, &c. ſhall be allowed.—§ 3. provides "That nothing herein contained ſhall extend or be conſtrued to extend to any places of public reſort, entertainment, or exhibition of any kind whatſoever that now are, or hereafter may be erected or exhibited on any of the premiſſes belonging to the hoſpital for the relief of poor lying-in women in the city of *Dublin*, ſo long as the profits ariſing from ſaid entertainment or exhibition ſhall be applied to the ſupport of that charity, ſo that neither regular tragedy or comedy ſhall be exhibited therein."—§ 4 provides "That nothing herein contained ſhall extend or be conſtrued to extend to prevent the exhibition of any feats of horſemanſhip, puppet ſhew, or ſuch like ſpecies of entertainment."—§ 5 enacts, "That if any interlude, tragedy, comedy, prelude, opera, burletta, play, farce, pantomime, or any act, ſcene, or part therein, ſhall be acted, repreſented, or performed in any

with theſe words, "*unleſs thereunto duly au-* 1788.
"*thorized by us and our ſucceſſors*," which
words Mr. Attorney General ſaid he had in-
ſerted in the draft of the patent in order to
obviate any doubts; but for *Daly*, Mr.
Duquery, Mr. *Curran*, Mr. *Egan*, Mr. *Burſton*, Mr. *M. Smith*, and Mr. *G. J. Browne* argued that *Aſtley*'s patent, though it profeſſed to be under the act, was not only not warranted by it, but was even repugnant to it. The act has in view the eſtabliſhment of a well regulated theatre, to improve the morals of the people, and for that purpoſe impowers the crown to grant patents; but this to *Aſtley* provides, that he ſhall not exhibit any regular tragedy, comedy, opera, play, or farce, nor ſuch as ſhall have been exhibited at the *Theatre Royal* before the date thereof. It is to become a theatre to exhibit every ſpecies of buffoonery, and diſtortion of the human figure, learned pigs, monkeys, and dancing dogs. Such cannot be called a regular theatre, or contribute to improve the morals of the people. It would defeat the purpoſes of the act, by withdrawing the the people from the rational and inſtructive entertainment of a well regulated theatre. This, your Lordſhip will conſider not only as comparing it with the object of the legiſlature,

Ex parte Daly.

any houſe or place where wine, ale, beer, or other liquors ſhall be ſold, or goods of any kind retailed, or any kind of entertainment exhibited, for which any money ſhall be paid, the ſame ſhall be deemed to be acted, repreſented, or performed for gain, hire, and reward, and liable to the penalties aforeſaid"—§ 6. enacts, "That no perſon ſhall be liable to be proſecuted for any offence againſt this act, unleſs ſuch proſecution ſhall be commenced within the ſpace of ſix calendar months after the offence committed, and that this act ſhall be to all intents and purpoſes deemed, noticed, and taken as a public act."

1788. *Ex parte* Daly.

ture, but alſo as keeper of the king's conſcience; in which character you will alſo attend to the loſs the preſent manager muſt ſuſtain, and the great expence that he has been at, upon the expectation of having the only theatre. For though the crown may grant divers patents, that power was given it only to puniſh a patentee for neglect or miſconduct, by granting another patent; but there is no imputation of neglect on the preſent patentee; but on the contrary, there are many affidavits ſtating the great expence he has been at, and the pains he has taken. Beſides, there is an inconſiſtency in the patent itſelf; it provides againſt *Aſtley*'s exhibiting what has been heretofore exhibited at the *Theatre Royal*, and yet authorizes him to exhibit muſical pieces and pantomimes, which notoriouſly have been exhibited at the *Theatre Royal* previous to this patent's being preſented for the great ſeal.

Lord *Chancellor*.—There are ſeveral ſtages of oppoſing the paſſing of patents. The firſt is an application to the crown while the granting of a patent is under the conſideration of his majeſty; upon ſuch an application, the crown would refer it to the great officers of ſtate. Secondly, When it comes to the privy ſeal, a like application may be made. The Lord privy ſeal has ſometimes heard the matter himſelf; at other times he has referred it to a committee. Thirdly, An application may be made to the great ſeal, if the grant be illegal, or if the crown be impoſed on or deceived. In ſuch caſes the Chancellor will withhold the ſeal.—In this caſe, as to the matter of diſcretion, whether the crown ought

or

1788.

Ex parte Daly.

or not to grant ſuch patent; I have nothing to do with that. The ſingle queſtion here is, whether theſe exhibitions of *Aſtley* are the ſubject of a patent within the act.

The Attorney General and Mr. *Boyde* againſt the petition.—Were it not for the ſecond clauſe of the act, *Aſtley* would not require a patent from the crown; a licence from the magiſtrate would be ſufficient. The act was to enlarge the power of the crown, not reſtrain it, as *Daly*'s counſel ſeem to think. It gives a monopoly to the crown. The act does not mention what is to be exhibited in the theatres for which the patents are granted. *Aſtley*, though he has exhibited for fifteen years in *Surry*, has not injured the *London* theatres, becauſe there the managers have provided entertainment better worth ſeeing than *Aſtley*'s exhibitions; whereas *Daly* thinks, and ſtates in his petition, that he will be injured, if there is any one place of enterment beſides his own theatre.—The *Theatre Royal* ought to be ſo eſtabliſhed as not to ſuffer from ſuch exhibitions. Emulation is neceſſary for that purpoſe. There is 100*l. per ann.* out of *Aſtley*'s profits reſerved to the *Lying-in Hoſpital*. He offered this as an inducement to the crown to give him the patent, not to bring himſelf within the ſaving clauſe.

Lord *Chancellor*.—The objections made to this patent are either, that it is illegal, or ſecondly, that it is inconſiſtent with that granted to *Daly*; that if there are more places of entertainment than one, the people will be divided. As to the firſt; the act gives a power

1788. *Ex parte* Daly.

a power to the crown to grant licenſes for eſtabliſhing and keeping a theatre, and enacts, that none others, than thoſe who are ſo licenced ſhall exhibit interludes, tragedies, &c. But the crown has power, by the act, to grant from time to time, and when and as often as it thinks fit, one or more letters patent, to one or more perſon or perſons for eſtabliſhing and keeping one or more theatres, &c. So that, if inſtead of this, the grant to *Aſtley* had been of a theatre in as ample a manner as *Daly*'s, can there be any doubt but that it would be good? Beſides, there is a reſervation in *Daly*'s patent, of ſuch as ſhould be thereafter licenced. As to the ſecond objection; that it infringes on *Daly*'s patent; that it tends to diminiſh his profits. Certainly, the more places of entertainment there are, it will make ſome difference to all. Perhaps it is better there ſhould be more. It is ſaid he has laid out money on the faith of having an excluſive patent. He had knowledge of the power of the crown to grant others; and his own expreſsly reſerved it. It is ſaid that I ought, as keeper of the king's conſcience, to withhold the great ſeal. But the granting of this patent has been conſidered by the Lord Lieutenant; ſo I do not think that I have any thing to do with that. If indeed the patent were illegal, it would be otherwiſe.—I can't withhold the great ſeal.

1788.

Saturday 26th *April.*

JONES againſt CUTHBERT, in error—*Exchequer Chamber.*

Jones *againſt* Cuthbert.

In debt for rent, defendant confeſſes part, and, as to the reſt, pleads eviction, by title paramount, for nonpayment of rent, and that he continued diſpoſſeſſed. Replication admitting the eviction, ſtates that the plaintiff redeemed, and traverſes the continuance of the diſpoſſeſſion. Defendant rejoins that he was evicted and continued diſpoſſeſſed. Special demurrer thereto, for tendering an iſſue as well on the eviction, which was admitted, as on the continuance, overruled.—The plaintiff being intitled to judgment for part of his demands, is to have his whole coſts.

THIS was upon a writ of error, on a judgment of the court of *Exchequer*, where the plaintiff *Jones*, in debt for rent, declared for 37*l.* 10*s.* in arrear for one year and an half, ending the firſt of *November*, 1782, upon an indenture of leaſe, between the plaintiff and the defendant, reſerving the yearly rent of 25*l.* by half yearly and equal payments, on the firſt of *May*, and firſt of *November*. The defendant, as to 12*l.* 10*s.* the gale due the firſt of *November*, 1781, confeſſed the action, and as to the reſidue pleaded, that *George* and *Elizabeth Jackſon*, as of *Trinity* term, 1781, brought an ejectment againſt *Jones* for nonpayment of rent, for lands of which the premiſſes in the declaration are parcel; that on the 28th *December*, 1781, the ſheriff, by virtue of an *habere*, delivered poſſeſſion to the feigned leſſee, by reaſon whereof the defendant, *Cuthbert*, was evicted, and ever ſince has continued and is ſtill evicted. The replication, admitting the proceedings on the ejectment and the eviction of *Cuthbert*, ſtated that the feigned leſſee on the ſaid 28th *December*, 1781, after the delivery of the poſſeſſion to him, ſurrendered to his leſſors; that they accepted the ſurrender, and demiſed the lands to the plaintiff for ſix months, if their title ſhould ſo long laſt; that the plaintiff entered by virtue thereof, and

1788.
Jones
againſt
Cuthbert.

and that *Cuthbert* re-entered, and became poſſeſſed and continued poſſeſſed until the firſt of *November*, 1782. The replication further ſtated that *Jones*, on the 27th of *June*, 1782, paid all rent and coſts to his landlords, and ſo held under his old leaſe, and concluded with a traverſe of *Cuthbert*'s continuing diſpoſſeſſed and evicted from the 28th of *December*, 1781, till the firſt of *November*, 1782. Defendant rejoined that on the 28th of *December*, 1781, he was of ſaid premiſſes and of ſaid term evicted and diſpoſſeſſed, and always from thence has continued evicted and diſpoſſeſſed, and of this, &c. To this rejoinder the plaintiff demurred ſpecially, aſſigning for cauſe, that though the replication admits that *Cuthbert* was evicted on the 28th of *December*, 1781, yet by the rejoinder he alledges the ſame over again; and though the replication traverſes only one material fact, viz. the continuance of the diſpoſſeſſion, the rejoinder tenders an iſſue upon both that and the eviction, which was admitted. This demurrer was over-ruled in the court of *Exchequer*, whereupon a general judgment, with 30*l.* 18*s.* 7*d.* for his coſts, was entered for the defendant.

Mr. *Blackburne* for the plaintiff.—As to 12*l.* 10*s.* the defendant confeſſed the action. As to that, therefore, the plaintiff ought to have had judgment and his coſts. The judgment which has been entered up cannot be ſuffered to ſtand. As to the other two gales; that due in *May*, 1782, incurred before the plaintiff redeemed; ſo that ſtands ſomewhat differently from that which became due in *November*, 1782, after the redemption on 27th

27th of *June*. The former muſt reſt upon a bare enjoyment under the plaintiff; but as to the latter, it was under the old title. When *Jones* redeemed, by paying *Jackſon* and his wife, not only he, but his undertenants were in, as if the ejectment never had been brought. This rejoinder ought to be put out of the caſe. There is a ſpecial demurrer to it, and if it be deficient in ſubſtance or in form, you will put it out of the caſe, and take it up upon the other pleadings. The rejoinder tenders an iſſue on a fact admitted by the pleading, that is, the eviction on the 28th of *December*, 1781; and there is no rule better eſtabliſhed than that no iſſue is to be tendered on a fact admitted. The fact traverſed in the replication is material or not; if not, the defendant ought to have demurred; if it was material, it ought to have gone ſingly to the jury. But the rejoinder tenders a complicated iſſue; firſt, on the eviction on the 28th of *December*, 1781; ſecondly, on the poſſeſſion's continuing evicted 'till *November*, 1782. One part of the iſſue muſt have been found one way; and the other might be found differently. The jury muſt diſcharge themſelves of the whole. At all events the plaintiff was entitled to judgment for the part confeſſed, and for his whole coſts. By the ſtatute 31 *E.* 3. c. 12. which erected this court, it is to give ſuch judgment as the court below ought to have given, and then ſend it into the *Exchequer* to have execution, 2 *Saund.* 256. 1 *Salk.* 401.

1788.

Jones *againſt.* Cuthbert.

Lord *Chancellor*.—Iſſue is only to be tried of what is averred on one ſide, and denied on

1788. Jones *againſt* Cuthbert.

on the other, that is, that the defendant continued out of poſſeſſion. He does not put himſelf upon the country upon what is admitted, but upon the latter part, the continuance out of poſſeſſion. The judgment is wrong. It ought to have been for the plaintiff as to the 12*l.* 10*s.* for which he ought to have prayed judgment when it was confeſſed; and then gone on for the reſt, for which there ought to be judgment for the defendant, for the plea is good as to the 25*l.* The queſtion is how to ſettle this matter as to the coſts.

This caſe ſtood over from the 17th to the 26th of *April*, 1788, when the chief juſtices delivered their opinions to the chancellor.

Lord *Earlsfort*.—In this caſe there is a manifeſt miſtake in the judgment. The defendant confeſſes 12*l.* 10*s.* and the plaintiff proceeds for 25*l.* the two ſubſequent gales. It could not be a matter upon which the court exerciſed their judgment; for it is for the defendant generally, ſo it cannot ſtand. The plaintiff demurred to the rejoinder. The court over-ruled the demurrer, and gave judgment for the defendant upon the whole, and coſts. It is now a mere queſtion of coſts; and it ſeems not neceſſary to ſay more than that the plaintiff muſt have his coſts; the queſtion is whether the defendant is intitled to any, the demurrer having been overruled; and on the authority of two caſes, I think that the defendant cannot have his coſts; ſo the judgment of the *Exchequer* muſt be amended as to that. The firſt caſe is *Miles* v. *Jacob*. *Hob*. 6. In an action for words, and alſo for a malicious proſecution, there was a verdict for the plaintiff with ſeveral

ral damages and intire coſts; and there was judgment accordingly. This was removed by writ of error, and the judgment as to the words was reverſed; but upon the other, plaintiff had judgment, and had coſts for the whole, *becauſe there was juſt cauſe of ſuit, which warranted the coſts, though part of the ſuit was without cauſe.* The other caſe is *Butcher* v. *Green*, *Doug.* 652. There there was one count in *Trover*, another for words; a juſtification being pleaded to this, was found for the defendant, yet the plaintiff, having got a verdict on the firſt count, had coſts for the whole. The ſtat. of 9 *W.* 3. *Seſs.* 1 *ch.* 35. amended by 4 *Geo. ch.* 13. is the only thing that ſeems to ſtand in the way. But that applies to caſes where the demurrer goes to the whole merits, and it appears upon the whole, that the plaintiff has no cauſe of action.—Therefore, the judgment ought to be reverſed in part, and amended by giving judgment for the plaintiff for 12*l.* 10*s.* and coſts, and judgment for the defendant, upon the demurrer, as to the reſidue.

1788. Jones *againſt* Cuhet.

Carleton, Ch. J. C. B.—The judgment ought to be reverſed as to the 12*l.* 10*s.* Then the queſtion is, whether the judgment is to be affirmed as to the two other gales. It has been ſaid the iſſue offered by the defendant, in his rejoinder, was too large, and involved a fact which was admitted by the pleadings; that is, the eviction, and that the eviction muſt be found for the defendant, and the continuance of the diſpoſſeſſion might be found againſt him. The defendant, in his plea, ſays, that on the 28th of *December*, 1781, he was evicted by title paramount, and

1788. Jones *againſt* Cuthbert

and continued diſpoſſeſſed 'till the firſt of *November*, 1782. The plaintiff ſays the eviction and diſpoſſeſſion did not continue ſo long. The defendant, perhaps, better had ſaid nothing, in his rejoinder, of the original eviction; but it is impoſſible for any difficulty to ariſe before the jury upon that. It is impoſſible for them to find as to the eviction contrary to the admiſſion of both parties, ſo they would have only to conſider the continuance of the diſpoſſeſſion. It was argued, but not much relied upon, as to the other parts, that the rent and coſts were paid in *June*, 1781, and, therefore, that the plaintiff is intitled to the third gale. The anſwer to this is, that the plea is an abſolute bar, if the facts ſtated be true, as they muſt be taken to be now. It is pleaded that the defendant continued diſpoſſeſſed 'till the firſt of *November*, 1782. Another circumſtance is, that the payment was ſubſequent to the commencement of the laſt half year. Another is, that an iſſue is tendered on both ſides, which goes to the whole merits and ſubſtance of the caſe. Therefore I think there muſt be judgment for the defendant as to the ſecond and third gales.

Now, as to the queſtion of coſts—The plaintiff's right to coſts originated under the ſtatute of *Glouceſter*, which gives the plaintiff *the coſts of his writ*. This was conſtrued 2 *Inſ.* 288, to mean all the legal coſts of the ſuit. But afterwards that was narrowed; as, if there were an action of covenant againſt two, and judgment againſt one by default; a plea by the other going to the whole merits, and iſſue joined thereon, and a verdict for the defendant; there the plaintiff

1788.

Jones *againſt* Cuthbert.

tiff ſhall have no coſts; that was determined upon the true conſtruction of the act, that when the plaintiff recovers ſome part, and appears to have a real cauſe of action, he is intitled to his coſts. That caſe is *Porter* v. *Harris*, 1 *Lev.* 63.—The right of the defendant to coſts originated by the ſtatute of *Marlbridge* 52. *H.* 3. *ch.* 6. where it is enacted, that if any Lord maliciouſly implead a lawful feoffee, the feoffee ſhall have his damages and coſts. Then came the 33 *H.* 8. *ch.* 7. which is confined to avowries, and enacts that where the avowry, cogniſance, or juſtification is found for the defendant, or the plaintiffs are nonſuit, or otherwiſe barred, the defendant ſhall recover damages and coſts againſt the plaintiffs, as the plaintiffs ſhould have done, if they had recovered. The 10 *Car.* 1. *ſeſs.* 2. *ch.* 17. extends this to actions of debt, and covenant, or upon any contract, and actions of detinue, account, upon the caſe, or, upon any ſtatute, for a perſonal wrong to the plaintiff. In ſuch caſes, if the plaintiff be nonſuit, after appearance, or a verdict paſs againſt him, the defendant ſhall recover his coſts to be aſſeſſed by the diſcretion of the judges of the court. 10 & 11 *Car.* 1. *ſeſs.* 4. *ch.* 8. extends it to ejectment, or any other action wherein the plaintiff might have coſts, if he recovered. By 9 *W.* 3. *ſeſs.* 1. *ch.* 35. the party getting judgment upon any demurrer, ſhall have coſts as if he had recovered upon a verdict. Stat. 4 *Geo.* 1. *ch.* 13. is confined to *ſcire facias* and *prohibition*; it removes the doubt upon the ſtatute of *W.* 3. whether the defendant, in ſuch caſes, getting judgment

1788. judgment upon demurrer was intitled to coſts.

Jones *againſt* Cuthbert.

The reaſon given in *Miles* v *Jacob Hob.* 6. 2 *Cro.* 343. applies here; the only difference between that caſe and this, is, that there there were two counts. *Grymſton* v. *Reyner*, *Cro. Eliz.* 537. is to the ſame purpoſe. So in *Coke's Ent.* 126. there is a verdict for the plaintiff for part, that the goods were neceſſaries, and upon the *mutuatus* the jury found the defendant within age; ſo the plaintiff has judgment for the former and his coſts, and the defendant is awarded to go quit as to the reſidue. In *Greenhow* v. *Iſley* and others, 2 *Barnes* 112. (136. 4to. *ed.*), plaintiff had judgment upon demurrer to two pleas, but on the trial of the iſſue on the third plea, was nonſuited. His coſts on the demurrers were deducted out of the defendants. That was under the *Engliſh* ſtatute of *Anne*, for pleading double, which gives the court a diſcretionary power.† 1 *Wils.* 331. *Tempeſt* v. *Metcalf*; if any one iſſue be found for the plaintiff, he muſt have his coſts. 1 *Stra.* 420. *Cutler* v. *Goodwin*; I don't give any opinion whether the court has the power there mentioned, that is, to make the defendant an allowance in the coſts *de incremento*, for any particular expence as to a bad count; but that caſe ſhews that in law the plaintiff is intitled to the coſts upon the whole. In 2 *Stra.* 1063. there is the ſame idea. In *Aſtley* v. *Young*, 2 *Bur.* 1232, there were two counts; a demurrer

† Only with reſpect to the *quantum* of coſts; not whether they will allow the plaintiff any coſts or not. *Duberley* v. *Page*, 2 *Term. Rep.* 391.

a demurrrer to one of them and judgment for the defendant; verdict for plaintiff on the other; the defendant not to be allowed costs. *Bridges* v. *Raymond*, 2 *Blackst.* 800; verdict for plaintiff on one count; his costs shall be taxed for the whole. *Norris* v *Waldron*, 2 *Blacst.* 1199. S. P.—The true ground is that the statute of *Glouceſter* gives the plaintiff his costs, and allowing the defendant's costs would be a deduction. In *Butcher* v. *Green*, Mr. J. *Buller* says the practice is uniform not to allow the defendant his costs. *Douglaſs*, in a note there, refers to the case of *Cooke* v. *Sayer*, where it was held that the plaintiff was not entitled to any costs, because, upon the whole, he appeared to have no cause of action. That is the true principle. It is that upon which the case in 1 *Lev.* 63. was decided. In this case I am of opinion, that, as the defendant has confessed the plaintiff to have had a cause of action, the judgment must be reversed as to the costs; and also as to the 12*l.* 10*s.* and as to the rest affirmed; and the plaintiff to have his costs, and the 12*l.* 10*s.*

1788.
Jones *against* Cuthbert.

Lord *Chancellor* declared himself to be of the same opinion.

Per Cur. Judgment amended.

1788.
Same day.

Hampton *againſt* Hampton.

HAMPTON againſt HAMPTON, and MOORE.

Exchequer.

Demurrer to bill for want of intereſt in the defendant, allowed.

THE bill impeached a leaſe made by one *Gabriel Hampton*, (who had a leaſe under the ſee of *Armagh*,) for fraud in inſerting a *toties quoties* clauſe of renewal to the defendant, without the knowledge of *Gabriel*. *Moore* was the witneſs to the leaſe, and the bill, which was filed for a diſcovery, charged that he knew of the fraud, but not that he was auxiliary to it, or intereſted in the leaſe. He demurred, for that it did not appear that he had any intereſt in the matter, and that he might be examined as a witneſs.

Mr. *Blackburne* for the demurrer. Mr. *Macartney contra*, cited 3 *P. W.* 312. *Hinde's Cha. Prac.* 159. 2 *Atk.* 324.*

Per Cur. Allow the demurrer with coſts.

* In *Hinde's Ch. Prac.* and all the editions of *Mitford*, the reference is erroneouſly to 2 *Atk.* 234.

QUIDIHY

1788.

Saturday, 3d of *May*.

Quidihy *againſt*. Kelly.

QUIDIHY againſt SARAH KELLY, *in the King's Bench.*

Avowry by a woman for arrears of a rent-charge granted to her *for life*, by a *termor for years*, with a proviſo, making it void if ſhe ſhould quit the grantor, *ſo as to cohabit with any other man*, without the grantors conſent, held good on demurrer. And the avowant ſtating that the grantor's term was made by a tenant for lives, need not make *profert* of the deeds by which the leaſe for lives was made.

IN replevin, the declaration laid the taking to have been on the 23d of *May*, 1786. The avowry ſtated, That *John Cramer*, now Sir *John Coghill*, being ſeiſed in fee of the *locus in quo*, by indentures of leaſe and releaſe of the 18th and 19th of *Auguſt*, 1754, demiſed to *Charles Doyle*, for three lives mentioned, and the life of the ſurvivor of them, (one of whom was averred to be living) or for a term of 52 years, whichever ſhould laſt longeſt; that by virtue thereof, *Charles Doyle* became ſeiſed, and that he, on the 14th of *March*, 1770, died ſeiſed, whereupon *William Doyle*, his eldeſt ſon, as ſpecial occupant became ſeiſed, and on the 19th of *Oct.* 1781, by indenture, demiſed to *William Knareſbrough* for 999 years; that *William Knareſbrough* became poſſeſſed, and on the 23d of *July*, 1783, he made his will, and therein deviſed his intereſt in the premiſes to *Michael Knareſbrough*, and on the 4th of *November*, 1783, died; that the executors proved the will of *William Knareſbrough*, and that by their aſſent *Michael Knareſbrough* became poſſeſſed; that on the 5th of *January*, 1785, he, by indenture granted to the avowant and her aſſigns, an annuity or yearly rent-charge, for and during the term of her natural life, of 100*l.* payable half yearly, by even and equal portions, with a clauſe of diſtreſs *prout*, &c. Then the

1788. Quidihy against Kell.

defendant avows taking the diſtreſs for 50*l.* of her annuity due on the firſt of *May*, 1786. The plaintiff, after oyer of the deed of the 5th of *January*, 1785, demurred ſpecially. The firſt cauſe of demurrer was want of *profert* of either of the deeds of leaſe or releaſe to *Charles Doyle*. But this cauſe was almoſt abandoned by the counſel for the plaintiff and was over-ruled by the court without difficulty. Another was, that it is alledged by the avowry that *Michael Knareſbrough* did grant an annuity or yearly rent-charge for and during the natural life of the ſaid *Sarah Kelly*, whereas it appears by the avowry, that the ſaid *Michael Knareſbrough*, at the time of ſaid alledged grant, had no ſuch term or intereſt in ſaid lands, as could by law warrant or enable him to make ſaid grant, &c. This caſe was argued on the 18th and 22d of *April*, by the Prime Serjeant (*Fitzgerald*) and Mr. *M. Smith*, for the plaintiff, and by Mr. *O'Neil* and Mr. *W. Flood*, for the defendant.

For the plaintiff.—The eſtate of *Michael Knareſbrough*, the grantor of the rent-charge, was the reſidue of a term for years. The queſtion here is not between the grantor and grantee; if it were, the deed indented would eſtop: but as againſt a third perſon, this avowry cannot be ſupported. It is a ſettled principle that a perſon claiming under a derivative eſtate, muſt ſhew the eſtate of the perſon creating it, that it may appear that he was enabled to make it. *March pl.* 2.—5 *Com. Dig. Pleader.* C. 36.—1 *Salk.* 562.—1 *Brownl.* 48.—*Cro. Car.* 571.—3 *Lev.* 193. 9 *Co.* 60. Here the avowant has not only not ſhewn a ſufficient eſtate in the grantor, but

1788.

Quidihy against Kelly.

but ſhe has ſhewn one which cannot ſuſtain her derivative eſtate. In the eye of the law, any eſtate for life is a higher and greater eſtate than a leaſe for years, though for 1000 years. *Co. Lit.* 46. *a.* Therefore the grant for life alledged to have been made by *Michael Knareſbrough* cannot be deemed valid. It is a maxim *omne majus in ſe continet minus*, which infers that, *nullum minus poteſt in ſe continere majus.* If an eſtate for life is greater than any term, a term for years cannot contain a freehold, and this cannot be carved out of it. If the king be poſſeſſed of a chattel, and make a grant in fee, it is void, 3 *Lev.* 134.

For the avowant.—It is a general principle, that where a grantor exceeds his eſtate or power, though the exceſs is void, yet the grant is good *pro tanto.* If tenant for life grant in fee, it will be good for his own life. If tenant in tail grant in fee, or for lives, or for the life of another, or for years, it is good during his life. If a tenant for years grant out of it a rent-charge to another for the life of the grantee, the grantee ſhall have it during the years, if he live ſo long. *Plowd.* 524. 525. 3 *Buls.* 125.—Yet it is but a chattel and *Wentworth off. ex.* ſays if a termor grant a rent to one and his heirs, it is not a freehold; but goes to the executor as a chattel. Here the avowant has not pleaded that ſhe was *ſeiſed* by virtue of the grant, or even that ſhe was poſſeſſed. Nor was it neceſſary; ſhe became poſſeſſed *prout lex poſtulat.* If ſhe had pleaded that ſhe was *ſeiſed*, it would have beenbad; but ſhe has not done ſo; and that

1788. Quidihy *againſt* Kelly.

that diſtinguiſhes this from *Butt's* caſe 7. *Co.* 23. where the avowant pleaded the grant out of a term for years, and concluded *virtute cujus*, he was ſeiſed, *in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ*, which is repugnant, to have a freehold out of a term for years.

An objection was made at the bar, to the avowants recovering, for that it appeared from the deed of grant, that the annuity was granted for an illegal conſideration, viz. illicit cohabitation. The deed contained a clauſe making void the grant, if *Sarah Kelly* ſhould at any time after be minded to quit or abſcond from the ſaid *Michael Knareſbrough*, *ſo as to cohabit with any other man* without the conſent or approbation of the ſaid *M. K.*

(Upon *Saturday*, 3d of *May*, 1788, the court gave judgment for the avowant. *Ex relatione.*)

Saturday 18th *May*.

Ex parte Wyly.

Ex parte SARAH WYLY.—In Chancery.

In the matter of *Mitchel*, a bankrupt.

A mortgagee who has a bond as a collateral ſecurity, under a decree for a foreclosure and ſale, receives part of his debt by ſale of part of the lands. The mortgagor becoming bankrupt, the mortgagee, upon giving up all remaining benefit of the decree, may come in for the deficiency, under the commiſſion.

THE bankrupt was indebted to the petitioner's late huſband in the ſum of 2000*l.* with intereſt due thereon, ſecured by a mortgage, with a bond and warrant, as

as a collateral ſecurity; and alſo in the ſum of 600*l.* and intereſt, ſecured by bond. The petitioner as perſonal repreſentative of the mortgagee, filed a bill againſt *Mitchel*, before his bankruptcy, for an account and foreclo-ſure.—Upon it ſhe obtained a final decree as to the mortgage debt, and for a ſale of the lands. Under that decree, part of the lands were ſold, and about 900*l.* of the mortgage debt ſatisfied thereout. Out of ſome other part of the mortgaged land, the petitioner, the mortgagor (who become bankrupt pend-ing the ſuit) and his aſſignees ſuffered them-ſelves to be evicted, not thinking the premiſſes worth the rent. A claim was made before the commiſſioners on her behalf, of the bond debt, and alſo of the reſidue of the mortgage debt, with an offer to releaſe the remains of the mortgaged premiſſes, and all benefit of the decree. This claim the commiſſioners refuſed to admit, by a ſpecial order, mention-ing that ſome of the lands had been evicted, and that the receiver appointed in the mort-gage cauſe had not received all that he might have collected. This petition prayed that her claim might be allowed, and the divi-dends paid to her. 1788. *Ex parte* Wyly.

The Solicitor General for the petitioner—(having ſtated the caſe as above.)—It is ſum-mited that the bankruptcy cannot alter the nature of the ſecurity. Suppoſe the debtor never had become bankrupt, the reſidue of the debt ſecured by the mortgage, might be levied either upon the convenant in the mort-gage deed, or upon the bond given as a col-lateral ſecurity. Here all that could be received out of the mortgaged premiſes has been got. It is the conſtant practice, when the whole of the

1788. *Ex parte.* Wyly. the mortgaged premiſes have been ſold, and they turn out deficient, to admit the creditor to come in for the deficiency. What difference does it make, where part has been ſold and the reſt is given up to the aſſignees?

Mr. *Chatterton*, on the ſame ſide, cited 2 *Atkyns*, 528, to ſhew that where mortgaged premiſes being ſold prove deficient, the creditor is to be admitted to prove the deficiency under the commiſſion.

Mr. *Doyel*, *contra*.—It was formerly held that a mortgagee was not entitled to relief under a commiſſion of bankruptcy. But that was afterwards mitigated, and he was allowed to claim, provided he gave up the mortgage intirely. In 1 *Atk.* 105. *Ex parte Grove*, Lord *Hardwicke* ſays, every creditor is to ſwear whether he has a ſecurity or not; if he has a ſecurity, and inſiſts upon proving, he muſt deliver up the ſecurity for the benefit of the creditors at large, be they mortgages or pledges.—If this claim be allowed, the other creditors will receive no benefit. Beſides, it is charged here, that the bonds were not paſſed for a debt due by the bankrupt to *Wyly*, but as a ſecurity, upon *Wyly*'s lending his credit to *Mitchel*.

Lord Chancellor—Suppoſe the ſecurity had been a pawn, of a gold watch, for example, (for a mortgage is only a pledge or pawn) and the ſecurity brings in not half the debt; but beſides it, the creditor has a bond; I do not ſee why he ſhould not claim under it.—If ſhe gives up the reſidue of the mortgaged premiſes, no doubt but that ſhe may claim the deficiency under the commiſſion. I will order that upon giving up her decree and all remaining

ing benefit thereof, ſhe may be at liberty to enter her claim, and prove the reſidue remaining unpaid; (it being ſuggeſted that ſhe is in the country and old) let the commiſſioners be at liberty to ſend down interrogatories to her, and let her be at liberty to anſwer them by affidavit. The claim not to be allowed till ſhe anſwers.—His Lordſhip obſerved that in *England* it was the uſual way to give a bond only, as a collateral ſecurity, with a mortgage, whereas here a bond and warrant is given. 1788. *Ex parte* Wyly.

End of Eaſter Term.

Trinity

1788.

TRINITY TERM,

28 Geo. III.

Saturday, 4th of *May*.

Schoales *againſt* *Kolb*.

SCHOALES and others againſt KOLB.—*In the King's Bench.*

In an inferior court, the plaintiff having fraudulently gotten judgment by default, the court below order that judgment, the finding of damages and final judgment thereon, to be ſet aſide. B. R. refuſes a *mandamus* to vacate that order thinking that the court below had acted rightly.

THE plaintiffs, merchants in *Derry*, had hired from the defendant, a foreigner reſiding abroad, a veſſel to carry a cargo of theirs from *Courland* to *Derry*. The ſhip having ſuffered ſome damage in the courſe of the voyage, *Kolb* in conſequence thereof, and not having any correſpondent at *Derry*, wrote to *Langley* in *London*, who put the ſhip, when ſhe ſhould arrive at *Derry*, under the care of the plaintiffs, *Meſſ. Schoales*, who were part-owners of the cargo. Upon her arrival, they and the reſt of the joint-owners, commenced three actions on the caſe againſt *Kolb*, in the *Mayor*'s court at *Derry*, and attached the veſſel. *Meſſ. Schoales* and the captain of the ſhip employed an attorney to defend the ſuits; and he brought *certioraris* which were lodged and received. The plaintiffs, having got into their hands bottomree bonds, ſold the ſhip under colour of them, without ſuit, in truſt for themſelves and greatly under value. But finding that they were not juſtified in

1788.

Schoales *againſt* Kolb.

in this, they tampered with the captain to betray the defendant's intereſt, and alſo prevailed upon the attorney to withdraw the writs of *certiorari*, which he did on the 18th of *July*, 1785. In conſequence of this the plaintiffs obtained judgments by default, for want of pleas, on the firſt of *Auguſt*, 1785, and writs of inquiry were iſſued. Upon theſe, inquiſitions were had on the 11th of *Auguſt*, and damages were aſſeſſed to upwards of 1200*l.* Hereupon judgments were entered on the 18th. Writs of *fieri facias* iſſued on the 19th, under which the ſhip was taken, and ſold on the 20th of *Auguſt*, 1785. The defendant having come to *Ireland*, was adviſed to apply to the court below to have the proceedings ſet aſide, and to be let in to plead. Accordingly, on the 6th of *June*, 1786, he made an affidavit of the circumſtances of the caſe for that purpoſe, and after ſeveral arguments before the *Recorder* of *Derry*, (Mr. *Boyde*) a rule was made in the court below, on the 5th of *March*, 1787, ſetting aſide the judgments by default, and all the ſubſequent proceedings. After the defendant had removed the cauſes by *certiorari*, the plaintiffs obtained a conditional rule for a *procedendo*, and for a *mandamus*, to the Mayor and Recorder of *Derry* to reſcind the rule of the 5th of *March*, 1787. Upon ſhewing cauſe this day, and on a motion on the part of the defendant, that the plaintiffs ſhould be obliged to proceed without delay, Mr. *Burſton* laid the circumſtances of the caſe before the court, and cited *Rex* v. *Peters*, and al' 1 *Bur.* 568. to ſhew that an inferior court can ſet aſide a regular interlocutory judgment, to let in the merits,

1788. merits, though there had been no fraud or surprize in obtaining it.

Schoales *againſt* Kolb.

The Attorney General and Mr. *Warren*, *for the rule.*—This is to be conſidered in two points of view. Firſt, with regard to the merits, upon the affidavits of all the parties. Secondly, upon a general abſtract queſtion whether an inferior court can ſet aſide proceedings, after final judgment. As to the firſt, the charge of fraud is, that the part-owners were reſorted to by *Langley*, and they prevailed on the attorney to deſert the defendant's cauſe. They retained an attorney of the firſt character in *Derry*, who ſwears that they introduced the captain to him, to give him inſtructions on behalf of *Kolb*. He accordingly appears for the the defendant, and the plaintiffs ſo far from ſnapping judgments, gave time to plead. The attorney afterwards deſerted the cauſe, there being no one to ſecure him his expences.—(*Cur.* That was no reaſon for his withdrawing the *certioraris*. Go to the other point.)—There is no caſe where it is expreſsly decided that inferior courts have no power to ſet aſide final judgments; but the doubts entertained of their power to ſet aſide interlocutory judgments, are ſtrong to ſhew the opinion of the courts as to the other. Inferior courts ought not to have power to judge what is of weight enough to ſet aſide a final judgment. After final judgment, their juriſdiction is at an end. It is admitted that they cannot ſet aſide a verdict on the merits. Here one ground of ſetting aſide the proceedings, was the exceſſive damages given by the jury. There has not only been final judgment, but execution; and

and the veſſel has been ſold to many different perſons. 2000*l.* has been laid out upon her, and ſhe has been employed in the *Greenland* trade. The proceedings were ſet aſide a year and a half after execution. Would this court, whoſe juriſdiction is not to be queſtioned, ſet aſide a judgment after ſuch a lapſe of time? If the plaintiffs have been guilty of fraud, the party may have recourſe to equity; and if his attorney has betrayed him, he has his action againſt him. 1788. Schoales *againſt* Kolb.

Lord *Earlsfort.*—This is a caſe of great fraud, and the plaintiffs application to the court is for the purpoſe of making it ancillary to it. The application is for a *procedendo*, and a *mandamus* to the court below, to vacate the rule of the 5th of *March*, 1787, ſetting aſide the judgments by default, and all the ſubſequent proceedings. The nature of the caſe is this—and ſee whether it is not of national conſequence)—The plaintiffs, merchants in *Derry*, contract with a foreign merchant. They are ſeveral joint-owners of the cargo. In conſequence of misfortunes on a long voyage, a correſpondence is inſtituted with ſome of the owners of the cargo, by means of a confidential friend, and they engage as his factors, and get the captain to employ an attorney for him. In the courſe of the proceeding, his own captain betrays him; his correſpondent betrays him; his attorney betrays him; and now the objection is that after *final* judgment the inferior court cannot ſet it aſide. That is not the caſe here. From the time of lodging the *certioraris*, all was an abſolute nullity. Suppoſe this were a mere domeſtic tranſaction (and we ought to lean

1788. Schoales *againſt* Kolb.

lean towards a foreigner, if any fraud appear) the defendants attorney betrays him, and withdraws the *certiorari*; and we are deſired to reinſtate unjuſt judgments by default, by making the court of *Derry*, which has ſet them aſide, much to the honour of thoſe who preſide there, reſcind that rule; that is, by making them do wrong, after they have done right. I take it upon this ground; that all after the *certiorari* were lodged was a fraud and a nullity; and with courts of equity, courts of law have a concurrent juriſdiction, in caſes of fraud. It is ſaid that there is no juriſdiction in the court below after final judgment. That is not this caſe. The jury was a mere inqueſt, and that and the judgment upon it was a mere drag and conſequence of the judgment by default. The defendant was abandoned by his attorney, his correſpondent, and captain; and as early as he could, he applied to the court below. If he had come immediately after the judgment by default, it would have been ſet aſide. All after that was the conſequence of the fraud. It is aſked, after ſo long a time would you allow the judgment to be ſet aſide? Yes; without heſitation.—The merits have never been tried. As to the vendees; that matter is not before us.

Henn J. Concurred.

Sir *Samuel Bradſtreet*.—I have no doubt of the juriſdiction of this court to compel an inferior court to do right. But here there is no occaſion for its interference. The inferior court has done right. The judgment was grounded upon the inqueſt of damages, which depended on the judgment for want of a plea;

a plea; and that was obtained by fraud. There has been no doubt ſince *Fermor's* caſe that fraud will vitiate at law as well as in equity. A final judgment means when the merits have been brought before the court, and diſcuſſed on demurrer, or upon a trial by a jury. The objection on behalf of the vendees is not before us. 1788. Schoales *againſt* Kolb.

[Note. It was aſſerted and not denied that the plaintiffs were the vendees.]

Bennett J.—Of the ſame opinion.

Per Cur. Allow the cauſe with coſts, and let the plaintiffs proceed without delay.

In

1788.

In Chancery.

Sir ANNESLEY STEWART Baronet, ſurviving executor of ALICE HOWARD, widow; adminiſtrator of the goods, &c. of JOHN DAVYS, unadminiſtered by CHARLES DAVYS; and alſo adminiſtrator of the goods, &c. of ANNE DAVYS, widow, unadminiſtered by the ſaid ALICE HOWARD, plaintiff.

Monday, 26th May.

ADAM NOBLE and FAITHFUL FORTESCUE, executors of ſaid CHARLES DAVYS; which ſaid F. FORTESCUE is alſo adminiſtrator of CADWALLADER, Lord BLANEY, deceaſed; CADWALLADER DAVYS Lord BLANEY and others, defendants.

Stewart *againſt* Noble.

A decree affirmed by the Lords cannot be reheard. A charge of debts upon real eſtate by a will, will not make ſimple contract debts carry intereſt.

THIS cauſe was before the court upon a rehearing.—In 1743 *John Davys* died inteſtate, leaving *Anne Davys*, his widow; *Charles Davys*, his eldeſt ſon and heir, *James*, his younger ſon; and four daughters; one of whom, *Alice*, was afterwards married to *Michael Howard*. Adminiſtration was granted to *Charles*. 1755 *Anne Davys* died inteſtate; and adminiſtration of her goods, &c. was granted to *Alice*. In *January*, 1757, *Michael Howard* and *Alice* his wife, filed their bill in this court, againſt *Charles Davys* and others, praying an account and diſtribution of *John's* perſonal eſtate; and ſhe, as adminiſtratrix of her mother, *Anne Davys*, prayed

1788.

Stewart *against* Noble.

prayed an account of the arrears of her mother's jointure, and of the diſtributive ſhare, which her mother was entitled to, of *John*'s perſonal eſtate. *Charles Davys*, in his anſwer, inſiſted upon his right under the marriage ſettlement of his father and mother, in 1699, to ſeveral ſums, which had been thereby, and by a deed executed in conſequence thereof in 1721, veſted in truſtees. The plaintiffs in their amended bill ſtated, that ſeveral eſtates which had been deviſed to *John Davys*, were cleared by him of the incumbrances affecting them, and ſuffered to deſcend in fee to *Charles*; and alſo that he ſuffered a leaſe for lives, which he had purchaſed, to come to *Charles*; though it was in his power to prevent both his taking the eſtates and the leaſe. This, they inſiſted, was to be deemed a ſatisfaction for the ſums mentioned in the ſettlement. On the 9th of *March*, 1761, the Lord Chancellor (*Bowes*) decreed "That it ſhould be referred to one of the maſters to take an account of the perſonal eſtate of *John Davys*, into whoſe hands the ſame came, and how it had been applied or diſpoſed of; and to report whether any, and what part thereof, ſtood out at intereſt on any, and what ſecurities, at the death of the ſaid *John Davys*; and whether any, and what intereſt, and by whom, had been received on account of ſuch ſecurities; and whether any, and what part of the perſonal eſtate of the ſaid *John Davys* had been laid out at intereſt ſince his death, and when, and by whom; and whether any intereſt, and to what amount, had been received on account thereof, and by whom; and whether any,

1788. Stewart *againſt* Noble.

and what part of the perſonal eſtate of the ſaid *John Davys*, ſince his death, had yielded any other, and what profit; and how much in the whole, and who had received ſuch profit; and alſo to take an account of what debts were due and owing by the ſaid *John* at the time of his death; and alſo to take an account of the perſonal eſtate of *Alice Davys*, into whoſe hands the ſame came and how diſpoſed of; and to take an account of what proviſion the ſaid *John Davys* made for his children in his life time, and what they received ſince his death." And his Lordſhip declared "that the truſts in the deeds of 1699 and 1721, as to *Charles Davys*, were ſatisfied by the real eſtate that deſcended to him from his father, and that *Charles Davys* was not entitled to any allowance out of the perſonal eſtate of the ſaid *John*, on account of the ſecurities in the ſaid deeds mentioned."—From this decree, ſo far as it related to the point of ſatisfaction, *Charles Davys* appealed to the Houſe of Lords in *England*, who, on the 22d of *April*, 1762, ordered and adjudged that ſo much of the decree as related to that point ſhould be reverſed; and it was declared that the truſts in the ſaid deeds were ſatisfied by the real eſtate that deſcended to the appellant from *John Davys* his father, except as to the mortgage made for 2000*l.* and intereſt, by *Thomas Forteſcue* to *St. Leger Gilbert* the ſurviving truſtee, which belongs to the appellant as firſt ſon of the marriage. And it was further ordered and adjudged, *that the ſaid decree in all other reſpects ſhould be affirmed*; and that the court of Chancery in *Ireland* ſhould give all proper directions for carrying the ſaid

1788.

Stewart against Noble.

ſaid decree with this variation, into execution. (*See this caſe reported in* 5 *Brown's Parl. Cas.* 552.) This having been made an order of the court of Chancery, proceedings were had before the maſter; but before he ſigned his report, *Alice Howard*, who ſurvived her huſband, died in 1768, having appointed the plaintiff and another executors of her will, who ſoon after revived the ſuit. Before any further proceedings were had, *Charles Davys* died in *July*, 1769, having made his will and thereof appointed *Adam Noble* and *Faithful Forteſcue* executors. He deviſed to them his freehold leaſe at *Hampſtead*, to be ſold for the payment of his debts and legacies, in aid of his perſonal eſtate; and in caſe of a deficiency, he charged it on all his other lands and real eſtates; which he deviſed to them and the ſurvivor, &c. ſubject to the payment of his debts and legacies to the uſe of Lord *Blaney*, &c. On the 13th of *June*, 1770, the plaintiff filed an original bill in the nature of a bill of revivor againſt the perſons claiming under *Charles Davys*'s will, praying an account of his real and perſonal eſtates, and of his debts, and if neceſſary, a ſale of a competent part of his real eſtate for the payment thereof; praying alſo the benefit of all the proceedings in the original ſuit, and that it might be revived againſt the other parties thereto. This cauſe being brought to an hearing, on the firſt of *Auguſt*, 1777, the Lord Chancellor (Lord *Lifford*) decreed, That it ſhould be referred to one of the maſters to take the ſeveral accounts directed by the decree of the 9th of *March*, 1761, in the original cauſe, as varied

1788. Stewart against Noble.

ed by the order of the Lords of *Great Britain*, upon the appeal in the ſaid original cauſe, that is to ſay, &c. &c. (*vide ſupra*) and alſo to take an account of the perſonal eſtate which *Charles Davys* died poſſeſſed of, or intitled unto, and into whoſe hands the ſame came, and how diſpoſed of; alſo an account of the freehold and real eſtates whereof the ſaid *Charles Davys* died ſeiſed, or to which he was intitled, and of the yearly rents payable thereout reſpectively, and into whoſe hands the ſame came, and how diſpoſed of; and alſo an account of all debts, legacies, and incumbrances affecting the ſaid perſonal, freehold and real eſtates of the ſaid *Charles Davys*, and their nature and priority; and that all creditors and legatees of the ſaid *Charles Davys*, and all perſons having incumbrances affecting the perſonal, freehold and real eſtates of the ſaid *Charles* ſhould be at liberty to go before the maſter, and prove the ſame; and if the perſonal eſtate of the ſaid *Charles* ſhould be inſufficient to pay all the debts and legacies of the ſaid *Charles Davys*, and incumbrances affecting the perſonal, freehold and real eſtates of the ſaid *Charles Davys*, that the maſter ſhould inquire what would be the amount of ſuch deficiency, and what parts of the freehold and real eſtates of the ſaid *Charles Davys*, ſufficient to ſupply ſuch deficiency, could be ſold with leaſt prejudice to the deviſees of the freehold and real eſtates of the ſaid *Charles Davys*.—The maſter to make all juſt allowances, and to report ſpecially upon matters of difficulty. On the firſt of *July*, 1784, the maſter ſigned his report, ſtating ſpecially a claim againſt the executors and truſtees

truſtees of *Charles Davys*, of intereſt on yearly balances of the unapplied aſſets of *John Davys*, and the produce thereof. 1788. Stewart *againſt* Noble.

To this the defendants excepted, as not warranted by the decree; and inſiſting that they ought not to be charged with more intereſt than had been actually received. On the 17th of *November*, 1786, his Lordſhip overruled the point, in favour of the defendants, without prejudice to the plaintiffs in reſpect of any courſe which they might be adviſed to purſue to obtain intereſt on the diſtributive ſhares for any time whatſover. A rehearing therefore was obtained, with a view to have the decretal order of the 9th of *March*, 1761, varied or explained ſo as to enable the maſter to take the account in that manner, to let in, at the final hearing, the queſtion of intereſt.

After argument, this cauſe ſtood over till *Monday*, 26th *May*, 1788, when the Lord Chancellor delivered his opinion.

Lord *Lifford*.—This caſe now ſtands for judgment. It is upon a rehearing; and the firſt queſtion is,—What is it a rehearing of? Is it a rehearing of the decree made on the 9th of *March*, 1761; or, is it a rehearing of the decree made on the firſt of *Auguſt*, 1777? This latter is my decree made for the maſters report, in purſuance of the former decree.—If this is to be conſidered a rehearing of the decree of 1761, I am clear and moſt decidedly of opinion that I can do nothing. Upon the rehearing of a decree, it can take effect but three ways; firſt, by reverſing the former decree, and making a new one; ſecondly, by affirming it; or, thirdly, by varying the decree, by affirming ſome part and reverſing

1788. Stewart *againſt* Noble.

verſing others. Theſe are the only effects that a rehearing can have. My Lords of *England* upon an appeal to them in 1762, make an order as follows; this is their order, "That, &c. (*vide ſupra*) and concludes, with declaring, *that the decree in all other reſpects ſhould be affirmed.*" Now, this decree being affirmed by the Lords, I can do nothing, if this is to be conſidered as a rehearing of that decree; for theſe reaſons; firſt, I cannot vary what has been affirmed by the Lords; ſecondly, there can be no rehearing, no appeal, where a decree has been affirmed by the Lords. No decree affirmed by the Lords can be reheard in this court, or any other; * thirdly, there was no croſs appeal; and where there is no croſs appeal, there cannot be a ſubſequent appeal as to any matters open upon the firſt appeal. I ſay there can be no ſubſequent appeal; much leſs can there be a rehearing. Therefore, if the plaintiffs were of opinion that the decree made in 1761, was not adequate, in this, that it did not make proviſion for the intereſt down to 1761, they ought to have brought a croſs appeal; but they did not; and therefore there can be no rehearing. Conſequently, I cannot conſider this as a rehearing of the decree of 1761.

Now, as to the queſtion, conſidering this as a rehearing of my decree on the firſt of *Auguſt*, 1777. That hearing, and that decree was on a bill filed by the plaintiff on the 13th of *June*, 1770. It is an original bill in nature of a bill of revivor, and it prays an account

* *Ante* 192. Magrath v. Lord *Muſkerry*.

account of the assets, real and personal of *Charles Davys*, and a sale of a competent part of his real estate, if necessary; he having by his will charged his debts on his real estates. That bill was filed by the plaintiff in the year 1770, and on that the cause came to an hearing on the first of *August*, 1777; and the decree was as follows. It was referred to the master, &c. (*See the directions of the decree of* 1761, *which were repeated in the decree of* 1777.) All these are exactly the accounts ordered by the decree of 1761, and affirmed by the Lords. Therefore, that part of my decree goes to carry that decree as affirmed into execution. Then comes as a new direction in consequence of the prayer of the new bill, "To take an account, &c." (*vide supra*). As to the first part of the decree it is only executive, to carry into execution the decree of 1761, as it was affirmed by the Lords. I could make no other than that, I could make no alteration. But this is a rehearing of my decree on the first of *August*, 1777. There are two parts of it. The first is relative to the transactions previous to the year 1761. The second relates to transactions after the death of *Charles Davys*, and the execution of his will, with respect to the charge made upon his real estate; for were it not for that, these demands would have been no charge on his real estate. At that time interest had never been insisted on; neither at the hearing, nor upon the appeal; nor was any direction given to the master about it. I must therefore presume, that there was no ground to order interest on the assets, prior to the year 1761. As to the second

1788.

Stewart *against* Noble.

1788.

Stewart *againſt* Noble.

cond part of the decree; it concerns what happened after the death of *Charles Davys*: and as to that I ought to have gone further. There are two matters before me. Firſt, it was inſiſted upon, in general, that an account ought to be taken of intereſt by annual balances, ſo that the court may be able to decree intereſt, if that ſhall be thought fit. Counſel for the plaintiff ſay, we do not now pray intereſt, but only a capacity in the maſter to take the account in that manner. As to this I can give no ſuch directions reſpecting the time previous to 1761; but it is open to me to do ſo between the year 1761 and the death of *Charles Davys*. Secondly, it is inſiſted that there ought to be intereſt decreed on the diſtributive ſhares, becauſe *Charles Davys* has charged his real eſtate with his debts.—Whatever money was in *Charles Davys*'s hands, he was debtor for in nature of ſimple contract debts: But it is inſiſted that it being charged by his will on his real eſtate, it ought to bear intereſt, and ſome caſes were cited to ſupport it. As to that, I think there is no title to intereſt, ariſing upon that account. 2 *Veſ.* 364, 588, ſhew what the rule is. The rule is this—A charge by will or deed on real eſtate in aid of the perſonal eſtate will not make ſimple contract debts carry intereſt, and Lord *Hardwicke* ſays, it would be moſt miſchievous, and would make people afraid to do that juſtice to creditors which an honeſt man ought to do, leſt they ſhould bring a great burthen on their eſtates by changing the nature of their debts. But it is otherwiſe where the debtor has done ſomething in nature of a ſpecialty,

as

1788.

Stewart *againſt* Noble.

as where in his life time he has created a truſt term for the payment of debts, and annexed a ſchedule of them. But this caſe falls under the general rule; under the general queſtion, whether charging of ſimple contract debts on real eſtate gives a title to intereſt.† It remains to conſider how this matter ſtands from the decree in *March*, 1761, affirmed by the Lords in 1762. At that time, I ſay, intereſt never had been inſiſted on. By that judgment every queſtion relative to *John Davys*'s eſtate ſeemed to be ſettled. All his debts were paid, or very nearly ſo. For all his debts are reported to have amounted only to 1174*l.* and it appears that 1000*l.* was paid in 1744. So that in all probability in the year 1762 all the debts were paid. I obſerve alſo on the report that the balance in *Charles Davys*'s hands in 1762, was about 1180*l.* This varied from time to time till *Charles Davys*'s death; and therefore it will be requiſite to ſee how it was applied during that time, between the time of the affirmance of the decree in 1762, and the death of *Charles Davys;* and the rather, becauſe, as I ſaid, all the debts ſeem to have been then paid, and that balance then in his hands. Therefore I affirm my former decree of the firſt of *Auguſt*, 1777, with this addition, "That the former maſter, Mr. *Walker*, do inquire and report what was the balance of the receipts and payments of the ſaid *Charles Davys* out of and in reſpect of the ſaid *John Davys*'s

* *Vide Car.* v. *Lady Burlington*, 1 P. W. 228. n. *Cox's ed. Bothomly* v. Lord *Fairfax*, 1 P. W. 334. n. *Cox's ed. Maxwell* v. *Wettenhall*, 2 *P. W.* 27. *Barwell* v. *Parker*, 2 *Ves.* 363. Lord *Lath* v. Lord *Bradford*, 2 *Ves.* 588. *Lloyd* v. *Williams*, 2 *Atk.* 108 and *Shirley* v. Lord *Ferrer's* 1 Bro. Cha. Rep. 41.

1788. Stewart *againſt* Noble.

Davys's perſonal eſtate on the 22d day of *April*, 1762, the day on which the Lords of *Great Britain* gave judgment on the appeal, and what was the balance at the end of each year from that time until and upon the 22d of *April*, 1769, next before the death of the ſaid *Charles Davys*; and whether any, and what part or parts of ſuch balances was or were placed out at intereſt upon any and what ſecurity or ſecurities for any and what time during the life of the ſaid *C. D.*; and whether the ſame was productive of any profit or advantage, or employed ſo as to produce profit or advantage; and alſo to inquire and report whether any and what debts of the ſaid *John Davys*, or any and what other demands on his eſtate (other than the claims of his next of kin, as ſuch, to a diſtribution of ſuch eſtate) were ſtanding out and unſatisfied on the 22d of *April*, 1762, and if any, whether the ſame have been ſince ſatisfied in part or in the whole, and when; and whether any, and what ſuits at law or in equity, touching the eſtate of the ſaid *John Davys* were then depending, and for what time afterwards; and let the ſaid maſter ſtate and report what would have been the diſtributive ſhares reſpectively of the ſeveral and reſpective perſons intitled to a diſtribution of the perſonal eſtate of ſaid *John Davys*, (ſave and except the ſaid *Charles Davys* and thoſe claiming under and from him) in caſe the ſame had been diſtributed on each of the ſaid annual days ſubſequent to the ſaid 22d of *April*, 1762. And reſerve the conſideration of intereſt in reſpect of the perſonal eſtate of the ſaid *John Davys*, in the hands of the ſaid *C. D.* or in reſpect of

of the aforeſaid diſtributive ſhares, from and after the ſaid 22d of *April*, 1762, until after the ſaid maſter ſhall make his report. 1788. Stewart *againſt* Noble.

Mem. From the decree thus amended the plaintiff appealed to the Houſe of Lords. The appeal was heard on *Monday* the 8th and *Wedneſday* the 10th of *March*, 1790; Lord *Fitzgibbon* being then Lord Chancellor. I was prevented by ſickneſs from attending the houſe on the day of the deciſion; but I have been informed that Lord *Lifford*'s decree was affirmed, and that their Lordſhips were of opinion, that, if there had been a croſs appeal, the addition made to the decree, on the 26th of *May*, 1788, directing the account of annual balances from *April*, 1762, down to *Charles Davys*'s death, ought to be reverſed; for the decree in 1761 affirmed by the Lords concluded the queſtion of intereſt down to that time, previous to which the material events reſpecting the ſtate and adminiſtration of *John Davys*'s aſſets had happened, and from 1762, there were no new facts ſhewn intitling the appellant to intereſt. Beſides, the appellant was concluded by the decree of 1777, for it was made in conformity to a draft ſettled and brought into court by the plaintiff's own counſel, as appeared from the regiſters notes. But if ſuch account were warranted, ſome of their Lordſhips thought that there was no reaſon why it ſhould ſtop at the death of *Charles Davys*. V.

The

1788.

Friday 30th *May*.

The King *againſt*. Foy.

The KING againſt JAMES FOY, otherwiſe SLADDEEN. In the King's Bench.

An acquittal of murder upon an indictment under 10 H. 7. ch. 21. againſt one as principal, preſent, aiding and abetting is a good plea in bar to an indictment againſt him, under the ſame ſtatute for procuring the ſame murder to be committed.

AT a general aſſizes, and general goal delivery, for the county of *Mayo*, at *Caſtlebar*, in *July*, 1787, an indictment † was found againſt *James Foy*, for provoking, ſtirring

† The indictment was as follows.—County of *Mayo*, to wit.—The jurors of our Lord the King, upon their oath, ſay and preſent, that *James Foy*, otherwiſe *Sladdeen*, late of *Turlough*, in the county of *Mayo*, yeoman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the 21ſt day of *February*, in the 26th year of the reign of our Sovereign Lord *George* the third, now king of G. B. F. & I. defender of the faith and ſo forth, at *Turlough* aforeſaid, in the county of *Mayo* aforeſaid, did, of his malice prepenſed, wilfully, felonioufly, and traiterouſly, provoke, ſtir up, and procure *Andrew Creagh*, otherwiſe *Craig*, &c. &c. all late of *Turlough* aforeſaid, yeomen, and divers other perſons at preſent to the jurors aforeſaid unknown, to ſlee and murder one *Charles Hipſon*, who was then and there a ſubject of our lord the king, within this land of *Ireland*. And the jurors aforeſaid upon their oath aforeſaid further ſay and preſent, that the ſaid *Andrew Creagh*, otherwiſe *Craig*, &c. &c. and divers other perſons at preſent to the jurors aforeſaid unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at *Kilnecarra* in the county aforeſaid, in and upon the ſaid *Charles Hipſon*, in the peace of God, and of our ſaid lord the king, then and there being, wilfully, felonioufly, traiterouſly, and of their malice prepenſed, did make an aſſault; and certain guns of the value of five ſhillings each, (each and every of the ſaid guns being then and there charged with gunpowder

ſtirring up, and procuring *Andrew Craig* and others, to murder one *Charles Hipſon*. This indictment being removed by *certiorari* into B. R. and the priſoner having been removed by *habeas corpus*, he was arraigned thereon, on *Friday* the 18th of *April*, 1788, when he gave

1788.
The King *againſt* Foy.

gunpowder and one leaden bullet; which guns they the ſaid *Andrew Creagh*, &c. &c. in their right hands reſpectively then and there had, and held to, againſt, and upon the ſaid *Charles Hipſon*) then and there wilfully, felonioufly, traiterouſly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up, and procurement of the ſaid *James Foy*, otherwiſe *Sladdeen*, did ſhoot and diſcharge; and the ſaid *Andrew Creagh*, otherwiſe *Craig*, &c. &c. with the leaden bullets aforeſaid, out of the guns aforeſaid, then and there by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid *Charles Hipſon*, in and upon the body of the ſaid *Charles Hipſon*, wilfully, felonioufly, traiterouſly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up, and procurement of the ſaid *James Foy*, otherwiſe *Sladdeen*, then and there did ſtrike, penetrate, and wound; giving to the ſaid *Charles Hipſon*, then and there, with the leaden bullets aforeſaid, (ſo as aforeſaid ſhot, diſcharged, and ſent forth out of the guns aforeſaid, by the ſaid *A. C.* &c. &c.) in and upon the body of him the ſaid *Charles Hipſon*, ſeveral mortal wounds of the depth of four inches, and of the breadth of half an inch; of which mortal wounds the aforeſaid *Charles Hipſon* then and there inſtantly died.—And the jurors aforeſaid, upon their oath aforeſaid, do further ſay, that the ſaid *Andrew C.* &c. &c. the ſaid *Charles Hipſon*, then and there, in manner and form aforeſaid, wilfully, felonioufly, traiterouſly, and of their malice prepenſed, did ſlee and murder. And ſo the jurors aforeſaid, upon their oath aforeſaid do ſay, that the ſaid *James Foy*, otherwiſe *Sladdeen*, then and there, in manner and form aforeſaid, wilfully, felonioufly, traiterouſly, and of his malice prepenſed, did provoke, ſtir up, and procure the ſaid *A. C.* &c. and divers other perſons at preſent to the jurors aforeſaid unknown, to ſlee and murder,

1788. The King *againſt* Foy.

gave in *propria manu*, a plea of *auterfois acquit*, ſetting forth an indictment and acquittal † of *James Foy* and others, of being preſent, aiding and abetting the ſaid *Andw. Craig* to commit the murder of the ſaid *Charles Hipſon*; and the plea averred that the treaſon death and murder in the indictment pleaded, is one and the ſame treaſon, death and murder

der, in manner and form aforeſaid, the ſaid *Charles Hipſon*, (who was then and there a ſubject of our ſaid lord the king, within the land of *Ireland*) contrary to the peace of our ſaid lord the king, his crown, and dignity; and contrary to the form of the ſtatute in that caſe made and provided."—Upon indictments ſimilar to this, (for procuring the murders of *Patrick Randall M'Donnell* and *Charles Hipſon*,) *George Robert Fitzgerald*, Eſq. and *Timothy Brecknock*, were tried and found guilty, before Lord Chief Baron *Yelverton* and Baron *Power*, at *Caſtlebar*, *June*, 1786. See the report of thoſe trials by *G. J. Browne*, Eſq.

† The plea was as follows.—" And the ſaid *James Foy*, otherwiſe *Sladdeen*, in his proper perſon comes, and having heard the indictment aforeſaid read, and proteſting that he is not guilty of the premiſes charged in ſaid indictment, for plea nevertheleſs ſaith, that he ought not to be compelled to anſwer to the ſaid indictment; becauſe he ſaith, that he hath heretofore been tried and acquited of the wilful, traiterous, and felonious killing of the ſaid *Charles Hipſon*; for that, at a general aſſizes and general goal delivery held at *Caſtlebar*, in and for the county of *Mayo*, on the 18th day of *April*, 1786, in the 26th year of the reign of our ſovereign lord *Georg* the third, by the grace, &c. &c. before the right hon. *Barry Yelverton*, Chief Baron of the Exchequer of the ſaid Lord the King, for this his kingdom of *Ireland*, the honourable Sir *Samuel Bradſtreet*, Bart. one of the juſtices of the ſaid lord the king, aſſigned to hold pleas before the ſaid lord the king himſelf for the ſaid kingdom of *Ireland*, juſtices and commiſſioners of our ſaid lord the king, and the hon. *Richard Power*, Eſq. ſecond baron of the Exchequer, of the

der, for which the indictment on which the prisoner is now arraigned was found, and not a different treason death and murder; and that the said *James Foy*, otherwise *Sladdeen*, in

1788.
The King *against* Foy.

the said lord the king, of the kingdom of *Ireland*, their associate, assigned to take all assizes, juries, recognisances, and certificates before any justices whatsoever taken; and also to hear, examine, discuss, and determine all and singular treasons, murders, manslaughters, burnings, unlawful assemblies, felonies, robberies, extortions, oppressions, transgressions, crimes, contempts, offences, evil-doings, and causes whatsoever, by whomsoever in any wise done, perpetrated, committed, or hereafter to be done, committed, or perpetrated within the said county of *Mayo*; and also assigned from time to time to deliver the goal of our said lord the king, in and for the county of *Mayo*, of all the prisoners and malefactors therein being; by virtue of a commission of our said lord the king, under the great seal of this his kingdom of *Ireland*, bearing date at *Dublin*, the 20th day of *February*, in the 26th year of the reign of our said lord the king, upon the oath of Sir *Neil O'Donnell*, baronet, &c. (the grand jurors) good and lawful men of the county of *Mayo* aforsaid, which said jurors being then and there duly sworn and charged to inquire on behalf of our said lord the king, and the body of the county of *Mayo* aforesaid, of all such matters, articles, and things, as were then and there enjoined and given them in charge,—it is presented in manner and form following—county of *Mayo*, to wit—The jurors of our sovereign lord the king, upon their oath, say and present, that *George Robert Fitzgerald*, late of *Turlough*, in the county of *Mayo*, Esq. *Timothy Brecknock*, late of, &c. &c. (the indictment pleaded here charges several other persons, and amongst them, *Andrew Creagh*, otherwise *Craig*, *James Foy*, otherwise *Sladdeen*, &c.) with divers other persons to the jurors at present unknown, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 21st day of *February*, in the 26th year of the reign of our sovereign lord *George* the third, now king of G. B. &c. &c. with force and arms, at *Kilnacarra*, in the county aforesaid, in and upon *Charles*

1788. The King *againſt* Foy.

in the ſaid bill of indictment named (which ſaid *James Foy*, otherwiſe *Sladdeen*, was by the Jurors acquitted, and *James Foy*, otherwiſe *Sladdeen*, named in the bill of indictment on

Charles Hipſon, in the peace of God, and a ſubject of our lord the king within the land of *Ireland*, then and there being, wilfully, traiterouſly, felonioufly, and of their malice prepenſed, did make an aſſault. And the ſaid *Andrew Craig* a certain piſtol of the value of five ſhillings, then and there charged with gunpowder, and one leaden bullet, which piſtol, he the ſaid *Andrew Craig*, in his right hand then and there had and held againſt, and upon the ſaid *Charles Hipſon*, then and there wilfully, traiterouſly, and felonioufly, and of his malice prepenſed, did ſhoot and diſcharge, and the ſaid *Andrew Craig*, with the leaden bullet aforeſaid, out of the piſtol aforeſaid, then and there, by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid *Charles Hipſon*, in and upon the left breaſt of him, the ſaid *Charles Hipſon*, then and there with the leaden bullet aforeſaid, out of the piſtol aforeſaid, by the ſaid *Andrew Craig* ſo as aforeſaid, ſhot, diſcharged, and ſent forth, wilfully, traiterouſly, felonioufly, and of his malice prepenſed, did ſtrike, penetrate, and wound, giving to the ſaid *Charles Hipſon*, then and there, with the leaden bullet aforeſaid, ſo as aforeſaid ſhot, diſcharged, and ſent forth out of the piſtol aforeſaid, by the ſaid *Andrew Craig*, in and upon the left breaſt of him, the ſaid *Charles Hipſon*, one mortal wound of the depth of four inches, and of the breadth of half an inch, of which ſaid mortal wound the ſaid *Charles Hipſon* then and there inſtantly died, and that the aforeſaid *George Robert Fitzgerald*, *Timothy Brecknock*, &c. &c. *James Foy*, otherwiſe *Sladdeen*, &c. &c. then and there wilfully, traiterouſly, and of their malice prepenſed, were preſent, aiding, helping, abetting, comforting, aſſiſting, and maintaining the ſaid *Andrew Craig*, the treaſon and murder aforeſaid, in manner and form aforeſaid, to do and committ. And ſo the jurors aforeſaid, do ſay, that the ſaid *Andrew Craig*, *G. R. F.—T. B.* &c. *James Foy*, otherwiſe *Sladdeen*, &c. &c.

on which he is now arraigned, are one and the ſame perſon, and not a different perſon. This plea having been read by the proper officer, the right hon. *John Fitzgibbon*, his majeſty's 1788. The King *againſt* Foy.

&c. the ſaid *Charles Hipſon*, then and there, in manner and form aforeſaid, wilfully, traiterouſly, felonioufly, and of their malice prepenſed, did ſlee and murder, againſt the peace of our ſaid lord the king, his crown and dignity, and alſo againſt the form of the ſtatute in ſuch caſe made and provided.—Whereupon the ſaid *James Foy*, otherwiſe *Sladdeen*, in his proper perſon, then and there comes before the juſtices and commiſſioners aforeſaid, under the cuſtody of the hon. *Dennis Brown*, ſheriff of the county of *Mayo* aforeſaid, to whoſe cuſtody the ſaid *James Foy*, otherwiſe *Sladdeen*, for the cauſe aforeſaid, was before that time committed, being brought to the bar of the ſaid court in cuſtody as aforeſaid, and forthwith being demanded concerning the premiſes in the ſaid indictment above ſpecified and charged upon him, how he will acquit himſelf thereof, he ſaith that he is not guilty thereof, and thereof for good and evil he puts himſelf upon the country; and the right hon. *John Fitzgibbon*, attorney general of our ſaid lord the king, who for our ſaid lord the king in this behalf proſecutes, in his proper perſon cometh and doth the like.—Therefore let a jury thereupon here immediately come before the juſtices and commiſſioners of the king abovementioned, of true and lawful men of the neighbourhood of *Caſtlebar*, in the county of *Mayo*, by whom the truth of the matter may be better known, and who are not of kin to the ſaid *James Foy*, otherwiſe *Sladdeen*, to recognize upon their oaths, whether the ſaid *James Foy*, otherwiſe *Sladdeen*, be guilty of the treaſon and felony in the indictment aforeſaid above ſpecified, or not guilty; becauſe as well the ſaid attorney general of our lord the king, who proſecutes for the ſaid lord the king in this behalf, as the ſaid *James Foy*, otherwiſe *Sladdeen*, have put themſelves upon the ſaid jury, And the jurors of the ſaid jury by the ſaid ſheriff for this purpoſe impannelled and returned, to wit. *Thomas Samuel Lindſay*, &c. being called come, who being choſen, tried,

and

1788. majeſty's attorney general *inſtanter* gave in a general

The King *againſt* Foy.

and ſworn to ſpeak the truth of and concerning the premiſes aforeſaid, in the indictment aforeſaid above ſpecified, upon their oath ſay, that the ſaid *James Foy*, otherwiſe *Sladdeen*, is not guilty of the treaſon and murder aforeſaid, in the indictment aforeſaid ſpecified, in manner and form as was ſuppoſed againſt him, and that he did not fly for the ſame; and it is therefore conſidered by the juſtices and commiſſioners aforeſaid, that the ſaid *James Foy*, otherwiſe *Sladdeen*, of the premiſes aforeſaid, in the indictment aforeſaid above ſpecified, be diſcharged and go without day. And this he ſaith is the record of his acquittal aforeſaid, before the king himſelf here ſent by command of our ſaid lord the king, and before the king himſelf remaining. And the ſaid *James Foy*, otherwiſe *Sladdeen*, further ſaith, that the treaſon death and murder in the bill of indictment before mentioned on which the ſaid *James Foy*, otherwiſe *Sladdeen*, was by the jurors of the ſaid jury acquitted in manner and form aforeſaid, is one and the ſame treaſon, death, and murder, for which the ſaid bill of indictment, on which the ſaid *James Foy*, otherwiſe *Sladdeen*, is now arraigned was found; and not a different treaſon, death, and murder, and that the ſaid *James Foy*, otherwiſe *Sladdeen*, in the ſaid bill of indictment named, (which ſaid *James Foy*, otherwiſe *Sladdeen*, was by the jurors of the ſaid jury acquitted in manner and form aforeſaid) and *James Foy*, otherwiſe *Sladdeen*, named in the bill of indictment, on which he is now arraigned, are one and the ſame perſon, and not a different perſon. And this he is ready to verify; and ſaith, that by the laws of this realm he ought not to be put on his trial again for the ſame treaſon, death, and murder. Wherefore he prays judgment of the court, and that he may go diſcharged and ſo forth."——Note—On the 8th of *October*, 1786, this ſame *James Foy* was arraigned at *Ballinrobe*, in the county of *Mayo*, before Sir *Samuel Bradſtreet*, upon an indictment ſimilar to that in the preſent caſe, for procuring the murder of *Patrick Randal M'Donnell*, when he put in a ſimilar plea of acquittal of him as principal preſent, aiding, and abetting, in which plea it was averred that the treaſons, murders, and offences

demurrer † thereto, which was read, and Mr. *C. O'Hara*, whoſe name was to the plea, immediately drew, ſigned, and gave in a joinder in demurrer, * which was read by the officer. Whereupon an attorney concerned for the priſoner, applied to the court to appoint counſel for him, and named Mr. *C. O'Hara*, Mr. *Stanley*, Mr. *Bloſſet*, and Mr. *Whiteſtone*,

1788. The King *againſt* Foy.

offences in the two indictments were one and the ſame treaſon, murder, and offence. Upon this averment, iſſue was tendered on the part of the crown, and being taken by the priſoner, was joined accordingly. The Jury under the directions of the judge found for the priſoner — The attorney general was not preſent at that trial. See the report of it by G. J. *Browne*, Eſq.

† The demurrer—"And now comes here the right honourable *John Fitzgibbon*, attorney general of our ſovereign lord the king, who for our ſaid ſovereign lord the king, in this behalf doth proſecute, and having heard the plea of the ſaid *James Foy*, otherwiſe *Sladdeen*, in manner and form above pleaded, for our ſaid lord the king, ſaith, that the ſaid plea of him the ſaid *James Foy*, otherwiſe *Sladdeen*, and the matters therein contained are not ſufficient in the law to excuſe or prevent the ſaid *James Foy*, otherwiſe *Sladdeen*, from being compelled to make anſwer to the ſaid indictment on which he is now arraigned, and this he is ready to verify. Wherefore for want of a ſufficient anſwer in this behalf, he prays judgment and ſo forth.

* The joinder in demurrer—"And the ſaid *James Foy*, otherwiſe *Sladdeen*, ſaith that the ſaid plea by him the ſaid *James Foy*, in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law to excuſe and prevent him the ſaid *James Foy*, otherwiſe *Sladdeen*, from being compelled to make anſwer to the ſaid indictment on which he is now arraigned, and this he is ready to verify. And becauſe the ſaid right hon. *John Fitzgibbon*, attorney general of our ſaid lord the king, does not anſwer to the ſaid plea, nor hitherto in any manner deny it, the ſaid *James* as before prays judgment.

1788. The King against Foy.

Whiteſtone, who were accordingly appointed counſel for the priſoner.—On *Friday* the 25th of *April*, 1788, the demurrer came on to be argued.

Mr. Solicitor General *(Wolfe)* for the king. This caſe is to be conſidered, firſt independently of the ſtatute 10 *H.* 7. *ch.* 21. whether at common law an acquittal of a man upon an indictment againſt him as principal in felony, is a bar to an indictment againſt him for being an acceſſory before the fact. Secondly, under that ſtatute, whether it is a diſtinct ſubſtantive offence, to provoke, ſtir or procure any perſon to ſlee or murder. As to the firſt point; if it were ſettled law that an acquittal of a man as principal was a bar to an indictment againſt him as acceſſory before the fact, it ought not to be now debated. In arguing this caſe, I ſhall firſt conſider how far that can be ſaid to be ſettled law; then, if it be not ſettled law, how the prejudice that it is ſettled has ariſen, and next what the law really and truly is. As to the firſt, it is ſaid, that the point was ſo ſettled in this kingdom in the caſe of The King v. *Dogherty*, upon a queſtion reſerved for the opinion of the nine judges. If that be ſo, I ſubmit. But I am informed that no ſuch fact occurred, and that the caſe was thus. At the ſummer aſſizes 1779, at *Roſcommon*, *Dogherty*, with ſeveral others, was indicted as principal for the murder of Mr. *Lawder*, and alſo for burglary; they were tried before Prime Serjeant *Burgh*, (afterwards Lord Chief Baron) who was of opinion that, as to *Dogherty*, the evidence only ſhewed him to have been acceſſory to the burglary before the fact.

1788.
The King
againſt
Foy.

fact.—(The facts of the caſe were theſe; *Dogherty* and the others aſſembled ſome nights before and reſolved to rob Mr. *Lawder*, no mention being then made of his murder; and the others on the night appointed went to Mr. *Lawder*'s houſe, without *Dogherty*.)—The Prime Serjeant directed him to be acquitted. He was ſo; and immediately afterwards, an indictment was ſent up and found, charging him with being acceſſory to the burglary before the fact. It being then ſuggeſted to the court that there was ground for pleading, he was not then arraigned upon the new indictment, and at the following aſſizes it was let to ſtand over till the ſummer aſſizes, when *Dogherty* pleaded *auterfois acquit*; and ſerjeant *Wood*, who was the judge, allowed the plea. That caſe, ſuch as it is, I admit, is againſt me; but it never was referred to the judges, nor did they ever give an opinion upon it.—(Lord *Earlsfort*—I have no recollection of it, as a caſe coming before the judges. I was then attorney general.)—One of the laſt writers upon the ſubject, ſo far from ſaying that it is a ſettled point, ſays, "it is a matter of ſome doubt, whether if a man be acquitted as principal, he can be afterwards indicted as acceſſory before the fact." 4 *Blackſt. Com. ch.* 3.—*Blackſtone* was a writer celebrated for his accuracy and diligence, and was well acquainted with the practice at the *Old Baily*. The next authority to this point is *Foſter*, 3 *Diſcourſe*, *ch.* 2. "It ſeemeth to be agreed"—he does not venture to ſay that is a *ſettled point*,—"*Upon what grounds I know not*, that if A be indicted as principal and acquitted, he cannot be afterwards

1783. The King *againſt* Foy.

terwards indicted as acceſſory before the fact."—If he had known it to be ſettled, he ought to have ſaid that the law was eſtabliſhed. The next writer to this point is *Hawkins* 2 P. C. *ch.* 35. § 11. he has doubted the practice and given a deciſive opinion againſt it. His words are—" It ſeems to be ſettled at this day, that an acquittal of a man as principal, is no bar of a ſubſequent proſecution againſt him as acceſſory after the fact; but it is holden in many books of good authority" (not that it is ſettled) " contrary to what is admitted to have been the ancient law, that the acquittal of a man as principal is a good bar of a ſubſequent proſecution againſt him as acceſſory before; for it is ſaid, that ſuch an acceſſory is in ſome meaſure guilty of the fact, and therefore that an acquittal which clears a man from being guilty of the fact, doth by conſequence clear him from being ſuch an acceſſory; and this ſeems reaſonable upon the ſuppoſition that a man may be found guilty on an indictment againſt him as principal upon evidence which only proves him to have been an acceſſory before." To this ſection are annexed many authorities. Many of them are falſely cited. He ſhews that one great caſe there cited is inconſiſtent with itſelf, and no authority for the point. So far to ſhew that it is ſtill a queſtion and a matter of doubt, whether an acquittal of a man as principal is a bar to an indictment againſt him as acceſſory before the fact.—Next I will endeavour to ſhew, upon authorities, how the law appears to ſtand; then I'll ſubmit that in point of principle and reaſon the plea cannot ſtand either conſidered on

1788.

The King *againſt* Foy.

on the ſtatute, or at common law, as I am now conſidering it. I have already cited *Hawkins*, *Foſter*, and *Blackſtone*. The laſt doubts, *Foſter* does not ſay it is *ſettled*, and *Hawkins* gives his opinion in my favour, and he ſhews that the foundation upon which thoſe writers of *good authority* build, is inconſiſtent with itſelf, that is the caſe from the year book T. 2 *Ed.* 3. fol. 26 *pl.* 14. Now as to thoſe writers upon whom the priſoner muſt reſt for the validity of his plea. The firſt is *Hale*, whoſe name is to be mentioned with reverence. In ſpeaking of him, I know that I tread upon ſacred ground, but ground which ought to be trod with reſpect, not with ſuperſtition. In 1 vol. P. C. 626. he ſays, an acquittal as principal is a bar to an indictment as acceſſory before; and the reaſon he gives, is, for it is in ſubſtance the ſame offence. "*But*, ſays he, *the ancient law was otherwiſe.*" In 2 *vol.* 244: what he had before laid down poſitively, becomes a matter of doubt.—"If A be indicted as acceſſory before the fact, he may (*as it is held*) plead *auterfois acquit* as principal, becauſe it is in effect the ſame offence. *But anciently the law was otherwiſe.*" In his *Summary*, 244. ſo far from laying it down as ſettled law he ſays, "*It ſeems*," &c. So we have no poſitive opinion from him; and even if we had, he does not ſay that is ſettled law. Beſides, it would not be deciſive authority unleſs he laid it down ſo in a judicial capacity. He cites *Staunforde*'s *Plac. Cor.* 105.—2 E. 3. 26. *Fitz. ab.* tit. *Corone* 150 & 282. *Staunforde*, I confeſs, does lay down the law to be ſo. As to

1788. The King against Foy.

to the other authorities, they utterly fail. *Fitzherbert*'s is no more than an abridgment of the year books, and a bad one: as to the case in P. 282. it is not upon the question at all. It is of an accessory after the fact. That other in P. 150. is only an abridgment of that in 2 E. 3. *fol.* 26. *pl.* 14. *Staunforde* does indeed lay it down that an acquittal of a man as principal, is a bar to an indictment against him as accessory before the fact. *Staunforde*'s is a methodical and excellent book, but he cites no decided authority for this. He cites *Bracton* and relies on him for this assertion. *Bracton* says that *præceptum et factum* are united inseparably, and *unicum generant factum*.† That is the authority on which *Staunforde* relies.

† The passage in *Bracton*, cited by *Staunf.* and here alluded to, is in *Lib.* 3. *cap.* 19. *f.* 11. *fol.* 139. but it does not appear there that *Bracton* had the point now in question, in his contemplation; nor was any one passage cited from *Bracton*, in this argument, to shew either his opinion upon it, or what the law was in respect to it at the time he wrote, i. e. *temp. Hen.* 3. In the passage here referred to, he only lays down that those appealed of aiding and abetting, or of counselling, by him that has also appealed the principal of the fact, shall not be put to their defence till the principal appellee be vanquished by him; and that then they are to join battle with that same appellant, though there be other appellants. His words are, "*Si autem appellatus de facto victus fuerit, tunc primo tenentur respondere appellati de fortia et præcepto, nec ulterius erunt replegiabiles, quia cum factum convictum fit tunc primo præsumi poterit quod subfuit fortia et præceptum, et ideo respondeant eodem die, et eodem die vadietur duellum inter primum appellantem et appellatos de fortia vel præcepto, secundum quod per ordinem positi sunt in appello, ita quod ille primo de fortia et postea ille de præcepto, quia fortia quodammodo sub se continet factum; quod quide non facit præceptum*

lies. *Hale* does not cite a ſingle caſe decided but 2 E. 3, and *Bracton*'s expreſſion is more quaint than wiſe. The next writer is *Kelyng* 25, 26. It is there ſaid, "We did agree, that if one was indicted as principal and acquitted, he cannot after be indicted as acceſſory before the fact."—Who the judges were does not appear. It was, I believe, on a commiſſion of *Oyer* and *Terminer* upon an indictment for burglary. Perhaps it is a ſufficient anſwer to it, to ſay, that that *dictum* was not upon a matter before them. The matter before them was of an acceſſory after the fact. *Kelyng* cites 27 *aſſiz. pl.* 10. *fol.* 134. and 8 *Hen.* 5. *fol.* 6, 7. Both theſe caſes are of acceſſories after the fact; and it is to be preſumed that he cited them only to the caſe before him, which was that of an acceſſory after the fact. Now with reſpect to the caſe, T. 2. E. 3. *fol.* 26. *pl.* 14. † This is the caſe upon

1788.

The King *againſt* Foy.

præceptum. Sed quare non poſſunt alii appellantes a primo et principali appellante, eo omiſſo, jungere duellum cum appellatis de fortia et præcepto? Et eſt ratio (ut videtur) quia fortia et præceptum ſunt quaſi ſequela facti principalis et ita ſunt conjuncta facto et annexa, quod a facto non ſeparentur, quia vulnus, fortia et præceptum generant unicum factum: non eſſet vulnus forte ſi non adfuiſſet fortia; nec vulnus nec fortia niſi præceptum præceſſiſſet.'

† The caſe is thus reported.—'John Golde *fuit endite en* Trailbaſton (*a*) *devant le Roy, del aſſent et de lenvoie de la mort un* Robert *et un* A. *come princ pal feiſor, le quel* J. *vient et ſe rendie et diſt que devant ces jours, il fuit endite de la mort meme celuy R. come princ pal feiſor, per que il fuit priſe, et devant* A. *et* B. *juſtices a la goale de C. fuit*

(*a*) *Trailbaſton*—Juſtices of *Trailbaſton* were a kind of juſtices of *Oyer* and *Terminer*, firſt appointed by *Edward*

1788. The King against Foy.

upon which every writer on the ſubject declares the law to have been changed, contrary to ſound ſenſe and reaſon. There *John Golde* was indicted for the *aſſent et de lenvoie* of the death of one *Robert*, as *principal feiſor*. He comes and ſays, that he was theretofore indicted for the death of the ſame *Robert*, as *principal feiſor*, and was acquitted. Then a converſation takes place, and *Scrop* ſays, that it

fuit acquite per verdiſt que diſt que de rien culpable, per que nentendomus point que de riens que toucha ſa mort vous voiles mitter a reſponder ; et miſt avant le record del deliverance

I. A. D. 1305, on occaſion of great diſorders that aroſe in the realm during his abſence in the Scotch and French wars. Their commiſſion is extant in *Rymer's Fœd.* 2 vol. 960. *Lond. ed.* 1727. To ſtate the various derivations aſſigned for the name, would exceed the limits of a note ; but ſee 12 *Co.* 25. 2 *Inſt.* 540. 1 *Guthrie's Hiſt. Eng.* p. 949, note, citing *Tyrrel's Hiſt. Eng.* 3 vol. 159, 160. *Cowel's* and *Blount's* Law Dic. tit. *Juſtices* of *Trailbaſton*, *Spelman's Gloſ. verbo Trailbaſton.* It ſeems not clear how this caſe of *Golde* came *devant le Roy*. That it was an indictment found before juſtices of *Trailbaſton*, and removed into B. R. ſeems not warranted by the words *endite en Trailbaſton devant le Roy*, or by any part of the caſe. The ſame words preciſely occur in T. 2 E. 3. *fol.* 28. *pl.* 21. which (notwithſtanding ſome difference and inaccuracies in that report,) ſeems to be the ſame with that reported 3 *Aſſiz. fol.* 6. *pl.* 15. which is reported as an *Iter* caſe, at *Northampton*. There is room, therefore, for conjecture, that the court of B. R. which at that time often attended the king, was ſometimes, in its peregrinations, armed with a commiſſion, or proceeded after the manner of the juſtices, of *Trailbaſton*, in which caſes, or perhaps where the offence was ſuch as was comprized in that commiſſion, the priſoner might be ſaid to be indicted *en Trailbaſton devant le Roy*.

it was only determined by that acquittal that he did not kill him, but not that he was not gnilty 1788. The King *againſt* Foy.

deliverance ſub pede ſigilli. Scrop (*b*) *Tout fuit il chace de ceo que il ne luy tua point, oveſq: ceo il eſtoit, que il fuit culpable del aide et del aſſent.*—Scorb (*c*).—*Il fuit acquite de riens culpable, et per conſequens quant que enſuiſt de ſa mort*; Scrop—*Quant il fuit arreign de ſa mort come feiſor, tout diſt lenqueſt de reins culpable, ceo doit referre a lour charge, s. ſil avoit tua, &c. Et poſuimus que lenqueſt euſt diſt que de reins culpable de la mort, mes del lenvoy, tout eit il eſtre acquite, ceo ne uſt point eſte de quant que touche ſa mort, per que nous aviſeromus, et puis* Scrop, *nous avomus regard a ceo que le primer enditement vous fait feiſor, et ceo en ore vous fait per envoier, et pur enſample que home puit en tiel caſe deux fois eſtre mis a reſponder nous agard que vous ales quites.*"—Several inaccuracies are obſervable in this part of the reports of this year, which does not ſeem equally authentic with the reſt; for it is not part of the original reports of that year, but a collection of caſes borrowed from ſome other book and added by way of appendix to the year book. 2 E. 3. See 2 E. 3. fol. 18.—There are ſome caſes in the initial books of *Lib. Aſſiz.* ſubſtantially the ſame with ſome in this part of 2 E. 3. but varying in their dates.

(*b Scrop* i. e. *Scrope*. Two perſons of this name appear in the liſts of the judges about this time, viz, *Geoffrey le Scrope*, who was appointed Ch. J. of B. R. 28 *Feb.* 1329. 2. E. 3. and therefore ſeems to be the perſon here meant. The other was *Henry le Scrope*, who appears to have been at different times Ch. Baron, Ch. J. of C. B. and Ch. J. of B. R. For the many changes on the bench with reſpect to theſe *Scropes*, ſee *Dugdale's Chronica Series* annexed to his *Origines Judiciales* from A. D. 1317, to A. D. 1335, incluſive.

(*c*) *Scorb*, ſeems to be *Robert de Scorburgh*, at this time counſel, as appears from ſeveral caſes in this year book; particularly in the next preceding caſe, he prays judgment as counſel. A. D. 1331. 4 E. 3. he was one of the juſtices in *Eyre*, and was made a baron of the *Exchequer*, A. D. 1333, vide *Dugdale's Chronica Series.*

1788. The King *againſt* Foy.

guilty of the *aid* and *aſſent*.† Afterwards, for example that (*que*) a man may be twice tried, the court awards him to go quit! Is this a caſe upon the authority of which the ancient law ought to be changed? The priſoner is made to go quit, to ſhew that a man in ſuch caſe may be tried twice! It is plain that the reporter did not underſtand the caſe. It cannot be collected from it, that the ſecond indictment was for being acceſſory before the fact. It rather ſeems that it was for being acceſſory at the fact, or principal in the ſecond degree. But to return to *Staunforde*, who wrote in the time of *Henry* 8.—He builds his aſſertions upon thoſe of *Bracton* who wrote in the reign of *Henry* 3. But the law was different in 8 E. 2. and *Staunforde* himſelf, 105, *b*. cites the caſe out of *Fitzherbert*, where it was held that a man acquitted of the fact might nevertheleſs be hanged for aiding, abetting, or procuring.* Such are the

† T 2 E. 3. *fol.* 27. *pl.* 17. ſeems to be the ſame caſe with 3 *Aſſiz. fol.* 6. *pl.* 14. In the former report the words are "*S fuit endite del aſſent et de lenvoie et del reſceitment.*" In the latter, the words are, "*del aſſent, eide et reſceit.* From this and from *Scrope*'s ſubſtituting "*aide*" for "*envoie*" it ſeems not clear but that *envoie* and *aide* were conſidered ſynonimous.

* *Staunforde* conſiders what fell from *Scrope* in 2 E. 3. 26 pl. 14. when the caſe was firſt before the court, as declaratory that as the law then ſtood an acquittal upon an indictment againſt one as principal in the firſt degree was no bar to an indictment againſt him as acceſſory before, or at the fact. "Which ancient law" proceeds *Staunforde*, "appears *Tit. Corone* in *Fitz* p. 424. *Anno Ed* 2. *Itinere Cantiæ* in the following manner.—*Nota quod quivis poteſt acquietari pro morte alicujus per patriam, et,*

1788.

The King *againſt* Foy.

the authorities. If the law is ſettled, the point ought not to be argued. But who will ſay that it is ſettled, when *Blackſtone* expreſſes a doubt; *Foſter* and *Hawkins* are of opinion againſt it; *Hawkins* reprobates the caſes where it is ſo held, and *Hale* in one volume ſays what the law is, but in another gives it only as the opinion of others? The reaſon for it given by *Hale* is, that the offence is the ſame. But the offence is *not* the ſame. It is ſettled law that if a man be indicted as principal, and the evidence turns out to ſhew him only acceſſory before the fact, he muſt be acquitted. The principle of the plea of *auterfois acquit* is, that no man is to be put in danger of his life twice for one and the ſame offence. If his life was not before in danger, he may be tried again. If an acceſſory before the fact, be indicted as principal, his life is not in danger. He is indicted for an offence of which he cannot be found guilty. If it be one and the ſame offence, how comes it that the ſame evidence is not ſufficient for either? The charges are ſpecifically different. The ancient law, it is agreed by all writers, was as I contend it now is. When and how was it changed? Was it changed by *Bracton*? No; for the law was different from his doctrine after his time. Was it by that caſe 2 E. 3.? No; for that is nonſenſe. It was not changed by the other caſes, for they are applicable only to acceſſories after the fact. This is

et, hoc non obſtante, ex indictamento vel ſecta alicujus de auxilio, abbetto vel procuramento, poteſt ſuſpendi pro morte ejuſdem; ut patet de occiſione Henrici Giſors de London, ad ſectam mulieris ſuæ, &c."

1788. The King *againſt* Foy.

is the great queſtion, upon the common law.

Now, with reſpect to the ſtatute 10 *H.* 7. *ch.* 21. If by it, the procuring of a murder be made a ſubſtantive treaſon, the plea cannot be allowed; for then the offence now charged is intirely different from that charged againſt him before. I was ſurpriſed at a queſtion being made whether the *crime* conſtituted by this act was made treaſon. Upon reading the ſtatute, I ſhould be at a loſs upon what to build the doubt. The title of the ſtatute is "*an act whereby murder of malice prepenſed is made treaſon.*" It recites the reaſon for making it.—"Foraſmuch as there hath been univerſal murder by malice prepenſed, uſed and had in this land by divers perſons, contrary to the laws of Almighty God, and the king, without any fear or due puniſhment had in that behalf."—And it enacts, "That if any perſon or perſons, whatſoever eſtate degree or condition he or they be of, of malice prepenſed, do ſlee or murder, *or, of the ſaid malice*, provoke, ſtir or procure any other perſon or perſons to ſlee or murder any of the kings ſubjects within this land of *Ireland*, be deemed traitor, attainted of high treaſon, likewiſe as it ſhould extend to our ſaid ſovereign lord's perſon, and to his royal majeſty."—Then it goes on ſaving to the chief lords their eſcheats; which ſhews that murder was, by the enacting part, to be attended with all the conſequences of high treaſon; for only in caſe of high treaſon the lord would loſe his eſcheat, but to prevent that loſs this expreſs ſaving was introduced. The practice is agreeable to this conſtruction.

The

1788.

The King *againſt* Foy.

The indictment for murder charges the fact to have been done *proditorie*, and the judgment is as for high treaſon. Stat. 9 *An.* ch. 4. recites that murder was made high treaſon by 10 *H.* 7. and a doubt therefore, whether appeals of death might be brought, and it ſaves the right of appealing. The words of 10 *H.* 7. are very obſervable as to the fact now charged. The words are, "or, of the ſaid malice, provoke, ſtir up, *or* procure, &c."—So that ſtirring up to ſlee is made a diſtinct offence, and the ſtatute gives thereby the ſame protection to the ſubject, as the law did to the king's perſon. The uſing the words, "of the ſaid malice" at the head of the ſecond member of the ſentence ſhews that it was the intention of the legiſlature to make the provoking, ſtirring up or procuring, diſtinct ſubſtantive offences from ſleeing and murdering.

Lord *Earlsfort* aſked whether there was any caſe or tradition in which the diſtinction, that the ſtatute operated *quoad pænam* only, and not *quoad crimen*, could be traced.—No ſuch caſe was ſaid to exiſt, and the bar ſeemed to agree that there was no authority for making the diſtinction.

Mr. *Whiteſtone* for the priſoner. The ſingle queſtion here is, whether the fact now charged is the ſame ſpecific offence as that of which the priſoner was before acquitted? It is ſo averred to be by the plea, and every thing well pleaded is admitted by the demurrer. I ſhall argue this caſe, upon theſe points; firſt, that in this kingdom murder is high treaſon; for if it were now felony, I ſhould doubt the ſafety of the priſoner. Secondly,

1788. The King *againſt* Foy.

condly, that procuring a murder is not made a diſtinct ſubſtantive offence; but correlatively, as having a relation to ſome fact done in conſequence. Thirdly, that procuring and committing a murder, are the ſame offence; and laſtly, that the plea of *auterfois acquit* here pleaded is a good plea. As to the firſt, I contend that murder is, to all intents and purpoſes, high treaſon under the ſtatute. Ancient uſage is the beſt criterion whereby to conſtrue a ſtatute. It is apparent by records that ever ſince the enacting of the ſtatute, murder has been conſidered as high treaſon. The uſage has been ſo. There is no inſtance to the contrary. There is not a ſingle indictment for murder, but what charges it as high treaſon. It is ſaid that there are no reports of them. But there are. I have ſearched the college library, and found many which charge murder as high treaſon; and not one to the contrary. † It is to be conſidered how high treaſon is created in a ſtatute. The ways of doing it are almoſt as various as the ſtatutes are numerous. Some enact generally, that the offence ſhall be high treaſon; ſome merely that the offender ſhall ſuffer as a traitor; others that the offender ſhall be adjudged traitor. Yet there never aroſe a ſingle doubt that the fact pointed at was high treaſon to all intents and purpoſes. They are all referred to and commented on by Lord *Hale*, * and it never occurred to him to doubt

† See Mr. *Whiteſtone*'s Reading on the Statute of Murder. 87—94.

* 1 Hal. P. C. ch. 24. 25.

1788.
The King against Foy.

doubt of the fact pointed at being high treaſon. Another ſtatute in the ſame words is recogniſed by him as creating the offence a treaſon †. It may be ſaid, perhaps, that the ſtatute makes the offence treaſon, only *quoad pœnam*, but not as to the nature and eſſence of the crime; that is, that the puniſhment is an accumulative penalty. If that were the caſe, the offender might be indicted at common law, as for felony, at the proſecutor's election. 2 *Bur.* 805. 834. *Cowp.* 524. 650. So an appeal would have lain, as at common law. But after 10 *H.* 7. ch. 21. an appeal of murder did not lie, as appears from 9 *An.* ch. 4. which reſtored the right of appeal in caſes of murder. This ſhews that after the ſtatute of *H.* 7. murder did not continue felony. If murder were ſubject to all the penalties of high treaſon, without its nature being altered, this ſoleciſm would follow, that a man would be attainted of high treaſon upon a conviction of felony. Secondly, procuring, ſtirring up, or provoking is not a ſubſtantive offence; but correlatively to ſome act done in conſequence of that procuring, or ſtirring up. Mr. Solicitor General has ſaid that 10 *H.* 7. meant to give the ſame protection to the perſon of the ſubject as 25 *E.* 3. gave to that of the king; that is, that a man would be guilty of high treaſon who ſtirs up another to murder, though no perſon be killed in conſequence. That poſition would lead to controvert eſtabliſhed principles, and to revive others too ſevere for the

† See *Reading on Stat. of Murder* 73—80.

1788. The King *againſt* Foy.

law to adopt. The principle of it is, *voluntas reputabitur pro facto.* There was a time when the intent was as criminal as the act. In 3 *Inſ.* 5. *Coke* mentions two caſes of it. But *Foſter* ſays, that that doctrine has long ſince been laid aſide except as to crimes affecting the king, queen, or prince. At common law therefore it would not exiſt in this caſe. So that procuring or ſtirring up is not an offence unleſs a murder enſues in conſequence. But it is ſaid that the ſtatute makes it treaſon independent of the act of murder enſuing. Now the ſtat. 25 *E.* 3. makes the procuring the death of the chancellor, treaſon, in the ſame manner as 10 *H.* 7. makes the procuring any murder, treaſon. Yet unleſs the perſon be killed in conſequence thereof, it is not a crime within 25 *E.* 3. 1 *Hale* P. C. 230. 1 *Hawk.* P. C. *ch.* 17. § 47. Therefore ſtirring up, &c. to ſlee or murder ſhall not be treaſon within 10 *H.* 7. unleſs the killing enſues. So that procurement is not a diſtinct ſubſtantive offence. Thirdly, procuring and committing a murder are the ſame offence. In high treaſons all are principals. What in felony makes a man an acceſſory; in treaſon, makes him a principal, *Foſter* 342. Acceſſories to an offence made treaſon by ſtatute, which does not mention acceſſories, are nevertheleſs principals, as at common law. If a man procure falſe money to be made, he is guilty of high treaſon. 12 *Co.* 82. *Hawk.* P. C. 440. 444. *new edit.* S. P. So the procurer may be ſaid to be guilty of the treaſon; and conſequently procurement and commiſſion are one offence. Evidence of procurement ſupports an indict-

ment

1788.
The King against Foy.

ment for committing treaſon, as counterfeiting the great ſeal, 12 *Co.* 82. *b.* Wherever one who was originally conſidered but as an acceſſory, is, by conſtruction of law, or by ſtatute, made a principal in the ſame offence, his guilt becomes equal to that of him, to whom he was before but acceſſory. Perſons aiding and abetting were formerly acceſſaries; their offence was derivative. But from the inconvenience attending that doctrine, the judges reſolved that, in conſtruction of law, they ſhould be made principals. *Plowd.* 99. *Fitz. ab. tit. Coron.* pl. 90. 216. *Staunf.* P. C. *lib.* 1. *fol.* 41. a. b., *fol.* 48. *b. Bract.* lib. 3. ch. 12. *f.* 11, 13. fol. 128. a.—*ch.* 19. *f.* 11. *fol.* 139. a. 2 *Hawk. ch.* 29. *f.* 7.—*Foſter*, 347, 348. ſhew that the guilt of thoſe who were formerly but acceſſories is become the ſame with that of thoſe who were principals; and evidence of aiding and abetting ſupports an indictment for committing the fact, and *vice verſâ*, 1 *Hale* P. C. 437. 438. 2 *Hawk.* P. C. *ch.* 46. *f.* 39. 9 *Co.* 67. *b.* Here procurers of murder are made principals; which they would be, even though the ſtatute were ſilent concerning them.—Taking this queſtion as it ſtood at common law, the procurer of a murder would be a derivative offender. His offence would depend upon ſome act done in conſequence; that is, it is not a ſubſtantive offence. There are no expreſs words in the ſtatute to alter that; but it is ſaid that there are words in it which have that effect. "Likewiſe as it ſhould extend to our ſaid ſovereign lord's perſon, and his royal majeſty."—Now by ſtat. *de clero* 25 E. 3. *ſt.* 2. *ch.* 4. (which was prior to the ſtatute

1788. The King *againſt.* Foy.

of treaſons) all perſons have the benefit of clergy, except in caſes of treaſon which concern the king himſelf, or his royal majeſty. So that if any ſubſequent act made a treaſon, the offender would have clergy, unleſs it were made a treaſon "as againſt the king's perſon or his royal majeſty." Therefore theſe words were introduced into the ſtatute of treaſons 25 E. 3. *ſt.* 5. c. 2. with reſpect to killing the chancellor, in order to ouſt it of clergy, and for the ſame reaſon they were made uſe of in this ſtat. 10 H. *ch.* 21. not for the purpoſe of making procuring a murder a ſubſtantive offence. Therefore, ſince murder is high treaſon, and conſequently procuring and committing a murder are the ſame offence, and evidence of procuring would have been ſufficient to convict the priſoner on the former indictment, his life was then in jeopardy, and ought not to be put into jeopardy again.

Mr. *Stanley* for the priſoner—I agree with the able counſel on the part of the crown, that when queſtions of public moment are ſettled, and rules of law have determined courts for a ſeries of years, it is better to adhere to them, than, by a nice examination of the principles of them, to expoſe the law to uncertainty. The ſolicitor general has made two queſtions. I will follow him in them and in his principles. The firſt queſtion he made was, whether this plea would hold at common law. The ſecond, whether the ſtatute 10 H. 7. has altered the common law in this country with reſpect to this point. He began with the lateſt caſe on this ſubject, The King v. *Dogherty*; and it is an authority againſt him. Though the perſons concerned in

1788.

The King against Foy.

in the proſecution were people in opulence, that determination has not been impeached. *Dogherty* is ſtill alive. The next authority cited is *Blackſtone*; an authority of much character. He has ſaid that this is a matter of ſome doubt, and he quotes for that doubt *Hawkins*, who raiſed the doubt, and *Hale*, who had none; and he concludes with agreeing to the reaſon given by Lord *Hale*, viz. that the offences are ſo nearly allied, that acquittal of the guilt of one may be acquital of the other alſo. The next authority was *Foſter*. He is the very authority I mean to rely on. He has ſtated that it appeared to him to be agreed that the law was ſo, that an acquittal of a man as principal is a bar to an indictment againſt him as acceſſory before the fact. He has ſubmitted ſome ingenious doubts, but concludes with ſaying, that they are private doubts of his own; and, in the next page, he mentions a caſe where the law was wrong in his opinion: yet the legiſlature was obliged to interpoſe; as where the principal ſtood mute, the acceſſory could not be tried. This was remedied by 1 *An. ſeſs.* 2. c. 9. *Eng.* and *Foſter* ſays that in diſcuſſing theſe points he is getting out of his ſphere. So that it appears he was directing his doubts to the legiſlature, not to the court.—Wherever there is a doubt the court will incline in favour of the priſoner. *Blackſtone* (4 *Com. ch.* 16), treating of burglary, puts a caſe, wherein there was a difference of opinion between *Bacon* and *Hale*. *Bacon* thought that if a man entered into an houſe without breaking, committed a felony, and then broke out, it was burglary. *Hale* thought otherwiſe. It was not held burglary till

1788. The King against Foy.

till 12 *An.* ch. 7. interpoſed. The next authority is *Hawkins*, and he ſtates himſelf, *that it is holden in many books of good authority*, that the acquittal of a man as principal is a good bar of a ſubſequent proſecution againſt him as acceſſory before the fact. He cites 2 E. 3. *fol.* 26. *pl.* 14. *Fitz. ab. Coron.* 150. *Hale's Sum.* 244. and *Kelynge* 25, 26. *Hawkins* underſtood theſe old caſes to have been of acceſſories before the fact. He cites two caſes againſt it, *Dalis*, 14, *pl*, 2—*Keilw*, 107. The latter has nothing to do with this queſtion. The queſtion there is, when two are appealed as principals, and a third as acceſſory to them, whether he ſhall be arraigned after only one of the principals is attainted, or muſt wait till both are attainted. To the paſſage in *Dal.* 14. there is no caſe annexed, but it is mentioned—"alſo they ſaid if there be indictee as principal, and he be found guilty as acceſſory, it is void."—It does not appear that it was not as acceſſory after the fact. The next authority ſtated by the ſolicitor general, was *Hale*. In *vol.* 1. 656. he lays it down expreſsly, that an acquittal of a man as principal is a bar to an indictment againſt him as acceſſory before the fact. This he lays down deciſively as his own opinion. In *vol.* 2. he ſays, "It is held, &c." that is, it is held by all the courts. The next authority is *Kelyng*, 25, 26. a book univerſally approved of, and ſanctioned by Lord *Holt*, its editor, who has put a *quere* to every thing in it which he had a doubt upon. *Hyde*, *Bridgeman*, *Twiſden*, and *Tyrrell* were the judges with *Kelyng*. He ſtates 27 *Aſſiz. pl.* 10. and 8 H. 5. 6, 7. as the ground of their opnion,

opinion, that an acquittal of a man as principal was a bar to an indictment againſt him as acceſſory before the fact. The former was before B. R. ſitting at *Kingston*.† In the latter it was held that upon an indictment againſt a man as principal, evidence that he counſelled is ſufficient, and therefore if he be afterwards indicted as acceſſory before, he ſhall have judgment to go quit.* 2 E. 3. 26.

1788.

The King *againſt* Foy.

† So it appears from the title of the caſes of that year. The caſe itſelf was thus. One who had been acquitted as principal in a felony, was indicted for receiving a man that had been outlawed for that ſame felony, and notwithſtanding the acquittal, he was put to anſwer this indictment, "*pur ceo*" ſays the book, "*que per la primer acquitance il ne fuit acquite forſque des choſes que poient eſte acceſſour le jour que le felonie ce fiſt et non pas des choſes que aviendront puis*," becauſe by the acquittal he was acquitted only of whatever might have been acceſſorial the day the felony was committed, and not of what ſhould happen afterwards.

* 8 *Hen.* 5. fol. 6. 7. The words referred to are "Hank. (*a*) *Si un home ſoit arreigne come acceſſorie, et ſoit acquite del principal, il avera judgement doler quite, car*, e converſo, *ſi un ſoit appel quil occiſt un home, et trove eſt que un auter luy occiſt per ſon counſel il ſerra pendus, et iſſint appiert bien ſil ſoit acquite del principal, que il eſt acquite del acceſſorie*—Cheyne (*b*)—*Home endite dauer counſell, ou force, ceo ad eſte dit ley, pur ceo que ſil ſoit eide ou counſell' al robberie, donques il eſt culpable de robberie, mes il eſt auter icy de receitment, pur ceo que il luy poit receiver nient conuſant le robberie.*"

(*a*) *Hank.* i. e. *William Hankford* made chief juſtice of B. R. 1 *Hen.* 5. A. D. 1414. He had been made a judge of C. B. 21 *Hen.* 3. A. D. 1398. *Vide Dugdale's Chronica Series.*

(*b*) *Cheyne, William*, made a judge of B. R. A. D. 1416. 3 *Hen.* 5. *Dug. Chron. Ser.*

1788.

The King *againſt* Foy.

26. *pl.* 14. was decided in B. R. The indictment was found at a commiſſion of *Trailbaſton*, *del aſſent et lenvoie*, that is, the ſending or procuring. The indictment, though that is not mentioned, muſt be taken to have been removed into B. R. where *Scrope* was chief juſtice. The very next caſe to it appears to have been commenced in *Trailbaſton*, and removed into B. R.—*Staunforde* 105. grounds himſelf upon *Bracton* who lays it down that in the time of H 3. the law was ſo. In 2 *Inſt.* 182. *Coke* cites *Bracton* for this poſition, *Vulnus, fortia et præceptum generant unicum factum.* It is not controverted that the law has been ſo from H. 3. except in a blind note of a caſe in 8 E. 2. which is not in the year books, and clearly is not law. As to what is ſaid, that the judges altered the law with reſpect to principals in the ſecond degree; I ſay they did not alter the law, but the mode of proceeding: and *Foſter* ſays, that where life is affected, the old diſtinction remains; as where acts of parliament take away clergy, and ſay nothing of aiders and abetters. Whilſt the old principle, *Voluntas reputatur pro facto*, remained, the adviſer might be found guilty upon an indictment againſt him for the fact. Though that principle was aboliſhed, the conſequence of it might remain. So till ſtat. *W.* 3. a poſthumous child could not take under a limitation of a contingent remainder, though the feudal principles upon which that doctrine was grounded had been aboliſhed. No caſe has been decided to the contrary ſince *Foſter* expreſſed his doubts. *Comyns*, 4 *Dig.* tit. *juſtices.* T. 3. recogniſes the law to be, that a man acquitted

1788.

The King against Foy.

quitted as principal cannot be indicted as acceſſory before the fact. That book is not to be conſidered as a mere compilation. The queſtion now remains, whether the crime of murder is altered by the ſtatute; and if it is, whether the ſame principles which would govern the caſe at common law, muſt not ſtill govern it, upon the ſtatute? The remedy provided by the ſtatute only takes away the benefit of clergy, The King v. *Dwyer. Gilb. Eq. Rep.* 267. In *Regina* v. *Whiſtler* 7 *Mod.* 129. 2 Lord *Ray.* 842, *Holt* recogniſes the diſtinction between acts of parliament which operate upon the offender, and not upon the offence, and thoſe which do operate upon the offence. The words of 10 H. 7. c. 21. "be deemed traitor, &c. &c." are tantamount to the words, "without benefit of clergy." For the ſtat. *de clero* gives all offences other than treaſons touching the king, the benefit of clergy; and there is no other way of taking away clergy, but by the expreſs words "without benefit of clergy;" or by words ſimilitudinary, as here,—Therefore I ſay, that 10 H, 7, ch. 21, operates upon the offender, not upon the offence itſelf, This diſtinction is ſupported by *Rex* v. *Page* and *Harwood*, *Aleyn*, 43, *Styles*, 86. *Rex* v. *Evans* and *Finch*, *Cro. Car.* 473; and *Foſter* 358, ſays this diſtinction may be thought nice, yet it is countenanced by great authority. If an act of parliament create a new offence, not only the indictment for it muſt bring the fact charged within the deſcription of the act; but the party indicted cannot be convicted of any other offence. *Contra formam ſtatuti* cannot

1788. The King against Foy.

cannot there be dispensed with. In *Rex* v. *Page* and *Harwood*, it was held that they might have been found guilty as at common law, though indicted upon the statute against stabbing, because the statute did not alter the nature of the offence. If 10 H. 7. altered the offence of murder, and made it a new specific offence, the indictee could not be found guilty of any other offence, than that new and specific offence created by the act. Has the statute been construed to give all the consequences of treason at common law? No; 'till 10 *Car.* 1. *sess.* 2. ch. 19, an accessory in one county to a murder committed in another, was not triable. In treason a prisoner standing mute is deemed convicted, 2 *Hawk.* ch. 30. *s.* 9. 1 *Hale* P. C. 317, and yet so lately as in the present reign, it was thought necessary to pass an act, (13 and 14 *Geo.* 3. *ch.* 16. *s.* 1.) making standing mute in cases of murder, equivalent to conviction—On the 18th of *November*, 1642, a bill was brought into parliament to explain the statute of *H.* 7. and one of the doubts was, whether the receiver of a murderer was liable to the penalties of treason. The bill was brought in to inflict the penalties of treason on such receiver; but it was rejected; because, I presume, the legislature did not think proper to inflict on him those penalties †.—(*Curia.* The treason

† Mr. *Stanley* did not cite any authority for this; and it does not appear from the journals of the house of commons that parliament was sitting at the time here mentioned. It appears from them that a bill to explain the stat. 10 H. 7. received a first reading on the 24th, and a second on

1788.

The King *againſt* Foy.

reaſon might be, that they thought the bill unneceſſary; that the caſe came under the former act.)—The doubt could not ariſe, if the ſtatute operated on the offence itſelf.—But, whether murder be treaſon or felony, the ſame rules and benefits in pleading muſt be allowed to an acceſſory in treaſon, as to one in felony. There is no doubt that in treaſon all are principals; but, ſays *Foſter* 341, it is a matter of great importance that the rule be rightly underſtood; that is, with thoſe limitations which found ſenſe and common equity require. For caſes have frequently happened, where an offender, in the final iſſue of the proſecution may be conſidered as a principal in treaſon, and yet, during the intermediate ſteps towards his conviction, he ought, from a principle of natural juſtice, to be conſidered merely as in the nature of an acceſſory before or after the fact, otherwiſe the abſurdity might follow that he might be convicted, and the principal on whoſe guilt his offence muſt depend, may be acquitted. 1 *Hale* P. C. 615—2 *Hale* P. C. 223. That this is ſo held now in *England* appears from the laſt edition of *Hawkins* P. C. *b.* 2. ch. 29. *ſ.* 2. *n.* The indictment for procuring a murder, againſt *George Robert Fitzgerald*, was the firſt of the kind that ever was preferred in *Ireland*, † and I hope that this will

on the 27th of *November*, 1634, when it was ordered that it ſhould not be engroſſed. It appears alſo, that a ſimilar bill was rejected on the 17th of *June*, 1641; but it does not appear in what point it was intended to explain the ſtatute, nor why the bill was rejected.

† The Attorney General ſaid he believed it was.

1788. The King *againſt* Foy.

will be the laſt. From the enacting of the 10 *H.* 7. till that time, no man had the enterpize to give a conſtruction to that act which neither the legiſlature intended it to have, nor courts of juſtice ever applied to it. There are many ſtatutes, which after creating a felony, go on, and ſay, that thoſe who counſel, &c. ſhall be deemed felons; and yet it never was thought that they were guilty of a ſubſtantive offence. Stat. 4 & 5 P. & M. *ch.* 4. *Eng.* takes away the benefit of clergy from acceſſories to murder before the fact; and yet, after that ſtatute, in Lord *Sanchar*'s caſe 9 *Co.* it was held that he could not be tried till the principal had been convicted. It is ſaid that the words, "or, of the ſaid malice, provoke, ſtir, or procure" are in the diſjunctive. I ſay they are put ſynonimouſly, and are to be conſtrued copulatively, and acceſſorially. "Compaſſing or imagining" in the ſtatute of treaſons, are conſtrued ſynonimouſly. 4 *Blac. Com.* ch. 6.—In the preſent caſe, inſtead of demurring the attorney general ought to have replied. *Hale*, 2 vol. P. C. 240, ſays that pleas in bar of the indictment of felony or treaſon are of two kinds, firſt, ſuch as are purely matters of record, as pardons; ſecondly, ſuch as are mixt, partly conſiſting of matters of record, partly of matters of fact; of this ſort is the plea of *auterfois acquit*; which conſiſts of two kinds of matters: firſt, matter of record, namely, the former indictment and acquittal; ſecondly, matter of fact; namely, that the priſoner is the ſame perſon that was acquitted; and that the fact is the ſame, of which he was acquitted, and whereof he is now indicted. And in

1788.
The King against Foy.

in page 243 he says, "the matter of fact of the plea consists in the averment that he is the same person; and that the felony whereof he was acquitted is the same whereof he is indicted; *which is issuable*, and the king's attorney may take issue upon it or confess it. Here it is averred in the plea that in is the same murder and treason; and on this the attorney general ought to have taken issue instead of demurring to the plea.

Bradstreet. J.—Suppose that the prisoner had pleaded to this indictment an acquittal on an indictment for a robbery; how is that to be taken advantage of? Is it not by demurrer?

This case was further argued the same day by Mr. *C. O'Hara* for the prisoner, but I was not present, V.

Mr. *Blosset* for the prisoner—The solicitor general has grounded himself on the position, that by the common law, an acquittal of murder does not acquit the prisoner of being accessory before the fact; and 8 E. 2. was cited to support it. But that is a short note, without any case, and unsupported by any authority; and it is not one authority or *dictum* that makes law; but a current of authorities. It is said that *Staunf.* 105. in laying down the law to be as we contend it is, pins himself upon *Bracton*, and yet that the law was contrary after *Bracton*'s time, as appears from that note, 8 E. 2. But *Staunf.* does not rely merely on *Bracton*, but says what the law is, and then adds, "and herewith agrees *Bracton*." It is certain that from 2 E. 3. down to Lord *Hale*'s time, the law was taken to be as we contend for. The case T. 2 E. 3. fol.

1788.

The King against Foy.

3. fol. 26. pl. 14. abridged in *Fitz. ab. Coron. fol.* 251. *pl.* 150 is the oldeſt authority. *Spelman*, ſpeaking of the commiſſion of *Trailbaſton* calls it "*acerrima inquiſitio; ne dicam, perſecutio.*" This ſhews that the benignity of the law towards an acceſſory muſt have been very great to make them lay down the law as it is there delivered. The word *que*, which occurs there, muſt be conſtrued "*leſt.*" To conſtrue it otherwiſe would make the court talk nonſenſe. 27 *Aſſiz. fol.* 134. pl. 10. abridged *Bro. ab. Coron. pl.* 105. and in *Fitz. ab. Coron. pl.* 200, was of an acceſſory after the fact; and the reaſon given for his being put to anſwer, is that upon the indictment againſt him as principal, he was acquitted only of ſuch acceſſorial matters as exiſted at the time of the commiſſion of the felony, and not of ſuch as happened afterwards, and the receipt was not then in *eſſe*. *Staunford* is ſaid by *Foſter* himſelf to have been the cleareſt and beſt writer on crown law before *Hale*, and he is greatly commended for his learning and accuracy by *Reeves*, *Hiſt. Eng. Law*, 4 *vol.* 569. He lays it down expreſsly that acquittal of a man as principal, diſcharges him of the offence of being acceſſory before the fact, for, ſays he, they are in a manner one offence, although done at different times; for when the felony is committed by reaſon of the commandment, the commander in ſuch caſes is party to the principal fact, but ſo is not he that is acceſſory after the commiſſion of the felony; and herewith agrees *Bracton*, who ſays that "*Fortia* † *et præceptum ſunt quaſi ſequela*

† *Fort'a*, the being preſent, aiding, and abetting. *Vide Foſter* 348.

1788.

The King against Foy.

quela facti principalis, et ita conjuncta facto et connexa, ut a facto non ſeparentur; quia vulnus fortia et præceptum generant unicum factum; nec eſſet vulnus forte niſi præceptum præceſſiſſet"—Then he ſtarts an objection. Perhaps, ſays he, it will be ſaid that though in *Bracton*'s time *fortia* was only an accident, yet now it is the principal fact; and ſo is *præceptum*, if he who gave it was preſent at the commiſſion of the felony when he gave it; and thence it will be concluded, that the caſes are not alike. But to that I anſwer, ſays he, that it makes no difference in the reaſon, ſince he is privy to the fact in one caſe as well as in the other; of which fact he is acquitted, and by conſequence of every thing that cauſed the fact. Thus the antient authorities are all to one purpoſe from E. 3. down to one not yet cited, viz. *Pulton de Pace Regis* 177. *pl.* 38. Speaking of principals and acceſſories, he ſays, acquittal of a man as principal, diſcharges him of being acceſſory before the fact, and cites *Bracton* and *Staunford*.—Now I ſhall ſtate the authorities, in their order, from the reſtoration to the preſent time. *Kelyng* 25, 26, has been already cited. It is of great authority. 1 *Hale* P. C. 626, is a declaration of the poſitive opinion of *Hale*, without reſerve. This is admitted.—His expreſſion 2 *vol.* 244. "As it is held" does not contradict what he had ſaid before; and it means only that it was ſo held by others, as well as by *Hale* himſelf. *Hawkins*, though he diſputes our poſition, is evidence againſt himſelf; for he ſays, that it has been ſo held by many of good authority. *Black-*

ſtone

1788. The King against Foy.

ſtone ſeems rather to incline to our poſition. *Hawkins* was laborious, but not always correct. In his chapter of perjury, he ſays, that writings of a public nature only are the ſubject of an indictment, contrary to the caſe of The King v. *Hayes*, 2 *Stra.* 843.—(*Bradſtreet*, J.—In his chapter on rape, he differs from *Hale*, and is clearly wrong. *Bennett*, J.—In *Barker* and *Omichund* 1 *Atk.* Lord *Hardwicke* only ſays that he was a laborious man. Lord *Earlsfort*—His book is a uſeful repertory, not a deciſive authority,)—*Addington*, upon the penal ſtatutes, page 1, ſays, if one be acquitted as principal, he is acquitted as acceſſory before the fact, but not after. Though he is not a lawyer, yet he muſt, from his office, have been very well acquainted with the law in this reſpect, and have known of any determination the other way, if there had been one.—Now, conſidering this caſe with reſpect to the effect the ſtatute has upon murder, I contend that whether the offence, in the ultimate reſult of your opinions, be conſidered as treaſon or felony, the procurer being ſtill either acceſſory or in the nature of an acceſſory, the acquittal of him as principal is a bar to a proſecution againſt him for the acceſſorial offence. The ſtatute 10 H, 7, like all others made on the ſpur of the times, is not to be favoured, but reſtrained. No penal ſtatute is to be extended by equity. Two thirds of the kingdom were then in a ſtate of barbarity, and, as the ſtatute recites, murder was univerſal. From the enacting of it to the preſent time the offence of the indictee has been held ſometimes murder; ſometimes

1788.

The King *againſt* Foy.

times manſlaughter; ſometimes homicide *ſe defendendo*. If the offence were clearly treaſon, that could not be ſo. Treaſon does not comprehend manſlaughter, &c.—But, even ſuppoſing that murder were treaſon, yet the courſe of proceeding is firſt againſt him that actually committed the very fact, that is the killing with malice prepenſe, 1 *Hale*, *Pl.* 613. and *Foſter* lays down the like, and takes notice that *Hale* has a chapter on principal and acceſſory in treaſon, though ſtrictly ſpeaking they all are principals. The ſolicitor General ſays that the words, "or of the ſaid malice," being put at the head of the ſecond branch of the ſtatute, make the offence of procuring, ſtirring up, &c. a diſtinct ſubſtantive offence; and alſo, that the word "or," runs through that clauſe, and therefore that the mere ſtirring up to murder, is a diſtinct, independent offence. But the words, "or of the ſame malice," do not imply that the legiſlature intended to make that a diſtinct ſubſtantive offence, which in its nature muſt be acceſſorial; and the words in the latter part of the ſentence, are all ſynonimous, like "compaſs *or* imagine" the king's death in 25 E. 3. To ſhew that they are ſynonimous—was there ever an inſtance of a *ſtirrer up* to a murder which was not committed, being indicted upon this ſtatute? The ſame applies to the word "*provoke*;" "*procure*," indeed implies an act done in conſequence; and ſo the judges in *The King* v. *Fitzgerald* held that if none of thoſe charged with the killing, were proved guilty, *Fitzgerald* could not be found guilty; ſo that the idea of procuring, being a ſubſtantive offence muſt vaniſh. A ſubſtantive

1788. The King *againſt* Foy.

offence is that which has an exiſtence of its own, not depending on any prior or ſubſequent offence—As to the words, "Be deemed traitor, attainted of high treaſon; likewiſe as it ſhould extend to our ſovereign lord's perſon, and to his royal majeſty," they are but ſimilitudinary. It is as if the legiſlature had ſaid to the offender, you ſhall ſuffer as if you had been attainted for compaſſing or imagining the death of the king; but we do not ſay that a crime which depends on a ſubſequent fact, ſhall be the ſame as a crime which terminates in the intention," as has been contended on the other ſide.—A great objection made to the doctrine we contend for, is, that if acquittal of a man as principal, acquits him of being acceſſory before the fact, it ought to be held correlatively, that an acquittal of a man as acceſſary, ought to bar an indictment againſt him as principal. But that does not hold. One acquitted of murder, is acquitted of all malice precedent; but acquittal of indictee as acceſſary, acquits him only of the malice, not of the fact; and he may, notwithſtanding, be found guilty of manſlaughter or homicide *ſe defendendo*.—Again, it is ſaid, in objection to our poſition, that evidence of the acceſſorial offence before the fact, is not ſufficient to convict an indictee as principal. I admit that the practice has been, that where ſuch evidence only has occurred, judges have directed an acquittal. But that has paſſed *ſub ſilentio*. The counſel for the priſoner would not diſpute it. The attorney general ſeldom attends at aſſizes. Humanity prevents others from objecting, and probably would prevent him. From the ſame reaſon

counterpleas

counterpleas to prevent a ſecond allowance of clergy are ſeldom uſed*. It is no where ruled that ſuch evidence is not ſufficient to convict, but it has been held that it is †. A ſecond proſecution againſt a man, as acceſſory, is not to be favoured; for it is the laches of the proſecutor, not to have enquired into the facts of the caſe.—A man acquitted of the murder of A. could not afterwards be tried on an indictment on the ſhooting act; ſhooting being only a particular mode of killing; and he being acquitted of the murder, is acquitted of all the modes of killing; ſo the offence of an acceſſory before the fact of murder, is only a mode of committing the deed. Now, thirdly, to conſider the effect of the demurrer. I contend that it admits the identity of the offences, which is averred by the plea; for being a general demurrer without any proteſtation, it admits all matters that are well pleaded, not only ſimple facts, but ſuch as are compounded of law and fact together. It cannot be ſaid that there is no inſtance of a proteſtation in a criminal caſe, In *Co. Ent. Burgh* againſt *Holdcroft* in appeal, from 53 to 56, there is a ſpecial plea of *auterfois acquit*, and a demurrer to it headed with a proteſtation. A proteſtation, Lord *Coke*, in the ancient quaint language, calls "an excluſion of a concluſion." *Blackſtone* 3 *Com. ch.* 20. ſays it is to avoid any implied admiſſion of a fact, which cannot with propriety or ſafety be poſitively affirmed or denied, and thereby the party interpoſes an oblique allegation or denial of

1788.

The King *againſt* Foy.

* See inſtances of ſuch counterpleas. *Leach's Caſes* 284. 341. 409, 410.

† 8 H. 5. fol. 6, 7. before cited.

1788. The King *againſt* Foy.

ſome fact, &c. Facts compounded of ſubordinate facts, or compounded of law and fact together, may make one point, and may be pleaded as one. 1 *Bur.* 316. *Robinſon* v. *Raley*. in treſpaſs defendant claimed a right of common; and it was held, that both the *property* and *levancy* and *couchancy* together, made but one defence, and might be both traverſed. Suppoſe we had pleaded that it was one and the ſame *fact;* the demurrer would have held; for the fact now charged, is not the ſame that was charged before; but the averment is, that it is the ſame treaſon, death and murder. *Hale*, 2 *Pl.* 241, treating of ſpecial pleas in bar, ſays that "the plea of *auterfois acquit* conſiſts of two kinds of matters, 1ſt matter of record, 2dly matter of fact; namely, that the priſoner is the ſame perſon that was acquitted, and that the fact" (i. e. the offence) "is the ſame of which he was acquitted, and whereof he is now indicted." In page 243 he ſays, the matter of fact of his plea, conſiſts in his averment that he is the ſame perſon, and that the *felony* whereof he was acquitted, is the ſame whereof he is indicted, *which is iſſuable*, and the king's attorney may take iſſue upon it, or confeſs it. In p. 255, he lays down that the averment, that it is the ſame offence, is neceſſary, and alſo that the averments are iſſuable.—If ſo, the attorney general ought to have taken iſſue upon our averment, and not having done ſo, but demurred generally, he has confeſſed the averments, and therefore the priſoner is entitled to judgment. Upon the whole, I ſubmit, that whether this caſe be conſidered as at common law, or under the ſtatute; or with reſpect

ſpect to the effect of the form of the demurrer, applied to the principle of the plea of *auterfois acquit*, judgment ought to be for the priſoner. 1788. The King *againſt* Foy.

The Attorney General, for the Crown.—I did expect that Mr. *Bloſſet* would have endeavoured to anſwer the arguments uſed by the counſel on his own ſide, (*Mr. Stanley*,) on whoſe principles I rely. So much has been ſaid on the ſubject of principal and acceſſory in felony, that I cannot diſmiſs it without obſervation; but the preſent caſe does not turn upon it. The caſes cited by Mr. *Stanley*, of *Page* and *Harwood*, and *Finch* and *Evans* ſhew this offence now charged, to be a diſtinct ſubſtantive offence, of which the offender muſt, (if at all) be indicted on the ſecond branch of the ſtatute; and if it be not as a diſtinct ſubſtantive offence, ſo indictable, no man can be convicted as acceſſory to a murder in this kingdom. I muſt however obſerve, that I think a further reviſion of the law relating to murder, is abſolutely neceſſary.—The principle of the plea of *auterfois acquit* is, that a man's life is not to be brought twice into danger for one and the ſame offence. 4 *Co.* 40 *a.* 45 *a.* and 47; and therefore, where on the firſt indictment, he could not have been convicted of the offence charged, he never ſhall be allowed to plead *auterfois acquit;* inſtances of which are, where the former indictment was defective, or where an appeal was brought by a perſon not warranted to bring it, &c.—This is plain common ſenſe; and when gentlemen are driven to refinements verging to abſurdity, they cannot ſpeak the common law of *England*, which is

1788. The King *againſt* Foy.

is the perfection of human reaſon. Can it be pretended that a man indicted as principal, could be convicted upon evidence only proving him to have been acceſſory before the fact? never; and for this reaſon; that he muſt have notice by the indictment, of what he is to defend himſelf againſt. Therefore it is nonſenſe to ſay, that indictee as principal has been indicted as acceſſory before the fact. Their offences are different, ſupported by different evidence, and charged by different indictments. In *Dalis.* 14 *pl.* 2. there is the opinion given of three judges, *Browne*, *Bromeley* and *Portman*, that "if a man be indicted for petit treaſon, felony or murder, and on not guilty pleaded, the jury find him guilty as acceſſory, and ſhew how; the verdict is void; becauſe it is of another thing than that wherewith they were charged; for they were charged only to enquire of the principal offence," and therefore indictee as principal cannot be found guilty as acceſſory, for the offences are different. There is the ſame doctrine preciſely in *Keilway* 107*. In the *King* v. *Atkyns*, 2 *State* T. 792, he was given in charge both upon an indictment againſt him as principal, and alſo upon one againſt

* *Keilw.* 107. It is ſaid *arguendo* by *Keble*, "a man may be both principal and acceſſory in one appeal; as if a man command another to kill a man, and afterwards together with him commit the felony; in this caſe, he who gave the command is principal; in as much as he was party to the act; and he is acceſſory by giving the command; and in this caſe, if he be arraigned as principal, and be found not guilty; yet if the other be found guilty, he ſhall be arraigned afterwards as acceſſory; and ſo he puts his life in jeopardy twice in reſpect of different things.

againſt him as acceſſory before the fact. A man may be appealed as principal, and alſo as acceſſory in the ſame appeal. 7 H. 4. 27. It follows that he may be indicted as principal and alſo as acceſſory. See on what the contrary doctrine is ſupported. 2 E. 3. One *Golde* was indicted *del aſſent et de lenvoie*, as principal *feiſor*. It is impoſſible to ſay from the caſe, whether he was indicted as acceſſory before or at the fact; if the latter, clearly the doctrine of that caſe is founded; for the ſame evidence would convict. *Scorb* ſays he he was acquitted before as principal *feiſor*. *Scrope* ſays that all that follows from that, is, that he did not kill the man, but it does not follow that he was not–*aiding* and aſſenting; afterwards *Scrope* changing his word calls it *envoy*. In the very next *fol.* (T. 2 E. 3. *fol.* 27. *pl.* 17.) *Scrope* decides that the pardon of the principal before attainder, was no bar to an indictment againſt the acceſſory: which clearly is not law; yet the determination of that man, and ſuch an unintelligible caſe, is to fix the law contrary to the opinion of *Foſter*, &c. The caſe in *Kelyng* is nonſenſe. There it is ſaid, that an acceſſory before the fact, is *quodammodo* principal, and yet that acquittal of a man as acceſſory before the fact, is not pleadable to an indictment againſt him as principal; which is nonſenſe, unleſs the converſe holds. I contend that the offences are different, to be charged by different indictments, and ſupported by different evidence. I cannot account for the *dicta* on the ſubject, (for there is no deciſion in the point but that in 2 E. 3.) but from their confounding acceſſories before, with acceſſories at the fact. The *dictum* in

1788.
The King
againſt
Foy.

1788. The King *againſt* Foy.

in *Kelyng* refers to 2 E. 3. and ſo do all the ſubſequent *dicta* by writers; ſo that they all reſt on that ſingle caſe. The doubts therefore expreſſed by *Foſter* and *Hawkins*, appear to be well founded. Murder is one offence, and procuring a murder is another offence, 1 *And.* 195. 1 *Hale Pl.* 625, &c. *Hawkins* ſays, that the only foundation that could be for the *dictum* is, that on evidence ſhewing the priſoner only acceſſory before the fact, he could be convicted upon an indictment againſt him as principal; which he certainly cannot. So unleſs the offences of acceſſory before the fact, and of the principal be the ſame: the ſame indictment applicable to either, and ſupportable by the ſame evidence, there is no principle in common law or common ſenſe, for the plea of *auterfois acquit* in ſuch caſe. But in this kingdom, the queſtion ſtands on different grounds from what it does in *England*; for, by the ſtatute, procuring a murder is made a diſtinct offence; and the procurer of a murder is no otherwiſe indictable, than upon the ſecond branch of the ſtatute. Murder was clergyable at common law. The *Engliſh* ſtat. 23. H. 8. ch. 1. was the firſt that ouſted it of clergy; ſo that it is is only by virtue of 10 H. 7. c. 21. that we convict capitally for murder, either principal or acceſſory. As the ſtatute is penned, if procurers were not named, they would not be indictable as acceſſories at all. They could not be indicted as acceſſories to a felony, for the crime is made treaſon; and it is decided, that ſtatutes excluding principals from clergy, do not exclude acceſſories unleſs named, nor *vice verſa*, 11 Co. 29. *Poulter*'s caſe. 1 *And.* 195.

1788.
The King
againſt
Foy.

195. Dy. 99. pl. 59. 183. pl. 59. 2 *Hawk.* pl. c. 33. § 26. 2 *Hale* P. C. 335, 336,—The rule ſtated by *Foſter*, 335, &c. is, that where a ſtatute ſays, that if a man ſhall do ſo and ſo, he ſhall ſuffer death as a felon; there aiders and abettors are not included, unleſs they are named; otherwiſe where the ſpecific offence itſelf is deſcribed. See how this applies to 10 H. 7. c. 21. "If any perſon or perſons, &c. of malice prepenſed do ſlea, &c. he ſhall be deemed traitor, &c." So that it applies only to the man who commits the fact. According to this rule, under this ſtatute, aiders and abettors muſt be indicted as principals and not otherwiſe; that is, they cannot be indicted under the ſtatute as aiders and abettors. Yet here the indictment pleaded, is for aiding and abetting; and if aiders and abetters are not indictable under the ſtatute, the indictment pleaded is bad and not pleadable. *Page* and *Harwood*, (*Aleyn.* 43. *Styles*, 86.) were preſent aiding and abetting one who made the thruſt, yet had their clergy. This caſe is commented on by *Foſter* 355. The words of the ſtatute of *Jac.* are "where any man ſhall ſtab or thruſt," he ſhall be ouſted of clergy; and the conſtruction held was, that aiders and abettors are not indictable under this act. The other caſe to this point, is that of the *King* v. *Finch* and *Evans*. *Cro. Car.* 473. There, the penalty being enacted againſt the perſon, aiders and abettors were held not to be included, becauſe not named; *a fortiori*, this holds in caſe of acceſſories; who are not principals in any degree. Therefore unleſs they were named in this ſtatute; unleſs you indict them upon this branch of the.

1788. The King *againſt* Foy.

the ſtatute, you can't indict acceſſories at all; for you cannot indict them as acceſſories to felony; and under the ſtatute you cannot indict them, but as they are mentioned therein. The inference I draw is, that if there were not this branch of the ſtatute, making the procurer of a murder a principal offender, he could not be indicted at all as an acceſſory before the fact. In *Plowd.* 97. *b.* there is a caſe upon the ſtatute of *præmunire*, of a procurer put upon his trial in the firſt inſtance; which ſhews his to be a diſtinct offence created by the ſtatute. It is not neceſſary to controvert that ſtirring up to ſlay or murder, is not a capital offence unleſs death follows; though it might be contended that it was; for the words are in the disjunctive. It is ſaid that the words "likewiſe as it ſhould extend, &c. &c. were inſerted in order to ouſt clergy; high treaſon never had clergy, and it would be ſtrange that they ſhould draw that conſequence with them, and none other. It has been argued that the demurrer admits the very thing that the priſoner wants; for it is ſaid, that it is averred that the treaſon death and murder, are the ſame as thoſe charged in the former indictment, and that this is admitted by the demurrer. To this I anſwer, that an averment againſt what appears on the face of the record matters not; and were an iſſue taken, and a verdict found thereon, it would be a jeofail and void, as appears by 11 *H.* 6. *fol.* 42. Suppoſe the acquittal pleaded, had been on an indictment for petty larceny, and this were averred to be the ſame treaſon, death and murder!

On

1788.

The King *againſt* Foy.

On *Friday* the 30th of *May*, 1788, judgment was unanimouſly given for the priſoner.

Lord *Earlsfort*, after ſtating the pleadings.—The general queſtion made for the court by theſe pleadings is, whether the treaſon, death and murder in the two indictments, (that is, that on which he was acquitted, and that on which he is now arraigned,) be in point of law ſubſtantially the ſame or different: or, in other words, more abſtractedly, Whether an acquittal of murder upon an indictment, under the ſtatute of 10 *Hen.* 7. *cap.* 21, againſt a principal, preſent aiding and abetting, be a good plea in bar to an indictment, under the ſame ſtatute, for procuring, ſtirring up, and provoking the ſame murder to be committed.

The gentlemen in ſupport of the proſecution and of the demurrer, maintain that the plea of *auterfois acquit* is not a good bar, upon two points or general poſitions. Firſt, they inſiſt that under this ſtatute, the provoking, ſtirring up and procuring a murder to be committed, is a diſtinct, ſubſtantive, different treaſon from ſleeing or murdering; and, ſecondly, they inſiſt that, if the priſoner is to be conſidered as in nature of an acceſſory before the fact, at common law, the rule of law is not a ſound one, which declares that the acquittal of a man as principal in felony, ſhall be a good plea in bar of an indictment againſt him, as acceſſory before the fact, for the ſame matter or tranſaction. As arguments by analogy ſerve in general to illuſtrate only, and ſeldom prove any thing; let me take up the words of the ſtatute upon which both indictments are grounded, and ſee what the intention,

1788. The King *againſt* Foy.

tention, meaning and operation of that ſtatute is, and has been conſtrued to be for near three hundred years, that it has had its effects in this kingdom. The words of the act are, "That, foraſmuch as there hath been univerſal murder by malice prepenſed, uſed and had in this land by divers perſons, without fear or due puniſhment had, it is enacted, that if any perſon or perſons, whatſoever eſtate degree or condition he or they be of, of malice prepenſe do ſlee or murder, or of ſaid malice provoke, ſtir, or procure any other perſon or perſons, to ſlee or murder any of the king's ſubjects within this land of *Ireland*, be deemed traitor attainted of haute treaſon; likewiſe as it ſhould extend to our ſovereign lord's perſon, and to his royal majeſty; and that the chief lords have their eſcheats and forfeitures of all manors, lands, tenements, rents, ſervices, with their appurtenances; any act to the contrary notwithſtanding." Let it be remembered, that it is admitted that the preſent occaſion has furniſhed the firſt inſtance of an indictment upon this clauſe of the ſtatute, ſince its commencement, though murder was then recited to be univerſal, and though the procurers are expreſsly claſſed in the ſame degree of guilt with the ſlayers or perpretrators of the fact. So much has been ſaid, and written, and publiſhed upon this ſubject lately, and it has become a matter of ſuch expectation, that, (to uſe the words of Lord Chief Juſtice *Treby*,) I cannot excuſe myſelf from going ſomewhat at large into it, though I own it does not ſtrike me as a queſtion, equal in difficulty to its novelty and importance. But before I go into the conſideration

1788.
The King *againſt* Foy.

tion of the queſtion, I would throw out of it, what does not belong to it. It has nothing to do with what is vulgarly called a ſtate or prerogative proſecution. It is, in the true conſtitutional ſenſe of the word, a ſtate proſecution; where the principal law ſervants of the ſtate are employed, as the moſt effective guardians of the lives and liberties of the king's ſubjects, to preſerve them againſt the tyranny, the treachery, and wickedneſs of the blackeſt and bloodieſt miſcreants of the human race, and by endeavouring to make diſtinguiſhed and ſalutary examples, (to uſe the words of the ſtatute,) teach men of all eſtates, degrees and conditions, that they are equally certain of due puniſhment, when they act contrary to the laws of God and the king. —The ſtatute appears to me manifeſtly to have done three things: 1ſt. It conſtitutes murder high treaſon, in the ſlayer or perpetrator. 2dly, It, by expreſs words, makes the provoker, ſtirrer or procurer of a murder, equally guilty of high treaſon, when the murder is or ſhall have been actually committed. 3dly, It denominates the ſpecies of treaſon, by which the crime of murder ſhall be puniſhed; viz. it ſhall be puniſhed as high treaſon againſt the king's perſon and his royal majeſty, in order to deprive the perſons found guilty, of the benefit of clergy, which otherwiſe under the ſtatute *de Clero.* 25 *E.* 3. they would be intitled. But it is ſaid by ſome of the gentlemen concerned for the priſoner, that murder is not made high treaſon *quoad crimen*, but *quoad pœnam* only. I early in the debate, aſked if there had been any caſe or tradition, in which that diſtinction could be traced;

1788.
The King *againſt* Foy.

traced; and no ſuch could be produced; and if the matter is conſidered for a moment, the diſtinction will appear nonſenſe. The legiſlature have but one way of making a crime treaſon; which is, by annexing the puniſhment, the judgment and penal incidents of high treaſon to it. Piracy was once high treaſon; houſe-burning is high treaſon; a great variety of crimes were made high treaſon by many ſtatutes, from 25 E. 3. to *Elizabeth*'s reign, how? by annexing the puniſhment and judgment of treaſon to thoſe offences; for, in themſelves, they have nothing in common with high treaſon, according to the common law idea of it; and the ſame words are uſed in a multiplicity of ſtatutes both *Engliſh* and *Iriſh*, that this ſtatute has uſed. Sometimes the thing forbidden is conſtituted high treaſon; ſometimes the perſon committing is conſtituted a traitor; ſometimes his puniſhment alone is mentioned, as to what he ſhall ſuffer, and *that* ſtamps the fact committed, with all the conſequences of high treaſon; ſo that the crime is deſcribed by its legal conſequences. Add to this the legiſlative ſanction given to this conſtruction, by the ſtatute of 9 *An.* cap. 4. *Iriſh.* which is a parliamentary opinion that murder is made high treaſon. This poſition cannot be proved more clearly by argument or authorities, than by Mr. *Whiteſtone* in his reading on this ſtatute, and the ſtatutes cited therein. The words "ſhall be deemed" mean "ſhall be, or conſtrued to be and eſteemed ſo." The reſervation of the eſcheats to the lords, by making the exception, proves the rule. To adopt a contrary conſtruction would lead to numberleſs abſurdities. The puniſh-

ment

1788.

The King *againſt* Foy.

ment denominates the offence juſt as poſitive laws ſhall or have claſſed it. But it is ſaid that this act has made the offence of the procurer a diſtinct ſubſtantive treaſon. In ſupport of this poſition, the argument is ſingularly unfortunate; for it is, that by making the procuring and ſlaying the ſame offence in guilt and puniſhment, it has made them different. But it will be neceſſary to examine this cloſer, becauſe the whole of the argument againſt the plea turns upon it, ſo far as the ſtatute governs the queſtion. Now, not only the words of the ſtatute, and the formation of the ſentence, but the very indictment, and the nature of human conduct, actions and events, all overthrow this poſition, viz. that the procurer and the perpetrator, are perſons guilty of diſtinct, independent, ſubſtantially different offences. The formation of the ſentence in the act, marks its meaning grammatically, viz. "If any perſon ſlee or murder, provoke, ſtir, or procure any other perſon," —they are mere words of enumeration, collecting all the claſſes of men, that are to be the objects equally of puniſhment; and the paragraph cloſes upon them all equally. Again; gentlemen who contend that they make different branches, to form different offences, prove too much; for then, according to their own reaſonings and admiſſions, *provoking* being circumſtantially different from *procuring*, and a different effort and exertion of the human mind; an acquittal for *provoking* or *ſtirring*, would be no bar to an indictment for *procuring*; and ſo *vice verſâ*; which would fritter away this univerſal principle of the criminal law of *England* and *Ireland* to a deluſive

1788. The King *againſt* Foy.

luſive ſhadow; the ſtrongeſt ſhield the ſubject has, that he cannot be twice put in peril for the ſame crime. But next, it is ſaid to be a different and independent ſubſtantive treaſon. That it is the ſame kind of treaſon is too plain to be argued. When murder was felony, procuring or provoking to that felony was acceſſorial to the principal in that identical offence. The ſtatute advancing the acceſſory in guilt and puniſhment, equal to the perpetrator, by making them all principals, brings them nearer, if not makes them the ſame.—But the nature of human conduct in the perpetration of offences, will not admit of their being different and diſtinct; for wherever the crime of one man, depends upon the act and crime of another, in the unalterable nature of things, that dependence or connection forms an acceſſorial relation, that can no more be deſtroyed, than the inevitable connection between cauſe and effect. No murder; no procurer.—The indictment in this caſe, clearly ſhews the dependence and connection, for it charges two things; that *Foy* procured *Craig* to murder, and that *Craig* did murder. The defence upon Not Guilty, would meet thoſe facts; that *Craig* did not murder *Hipſon*, or, if he did, that *Foy* did not procure *Craig* to kill *Hipſon*. It is one and the ſame death; one and the ſame murder; the ſame tranſaction; the ſame puniſhment; mentioned by the act to be the ſame guilt and offence. The difference is only in the part which the perpetrator and procurer take toward effectuating the ſame event; viz. the ſame death. Thus I think that thoſe who contend that the procuring is not acceſſorial,

1788.

The King against Foy.

ſorial, muſt admit that the ſtatute has made procurement of a murder when committed, and the act of *killing* the *ſame* offence. But why add thoſe words? I think they are no more than *expreſſio eorum quæ tacite inſunt*, and only *ex majori cautelâ*. Procurers were before the ſtatute acceſſories before the fact; and by making the crime of murder high treaſon, it makes them all principals; and here the novelty of this indictment, furniſhes a ſtrong argument that for three hundred years they were thought ſo: that period of time producing no indictment upon this part of the ſtatute, as for a different ſubſtantive offence. *Dum tacet, clamat.* But the Solicitor General, relying more upon the other point, viz. that the plea was not to be allowed to an acceſſory, or one in nature of an acceſſory, boldly denies the authority of the rule, and attacks its ſoundneſs. Now, if ever there was a rule fortified by great authority, it is, that a man acquitted as principal, may plead that acquittal to an indictment againſt him as acceſſory before the fact. The only two authors who doubt the juſtice of it, viz. *Foſter* and *Hawkins*, ſubmit to it as ſettled. Its antiquity is traced to the reign of *Edward* III. and the caſe cited from the year book as furniſhing a reaſon inconſiſtent with the determination, is manifeſtly made nonſenſe by a miſtake in tranſlating. The true meaning of the word is "*left**" a man may be tried twice for the ſame offence, we diſcharge you;" but it is tranſlated "*that*"; which diſgraces the judgment. The principle is however

* See *Boyer's* French Dictionary. 4to. Ed.

1788.
The King *againſt* Foy.

ever ſubmitted to, through the whole hiſtory of the criminal law; by lord *Hale* thrice, that he conſidered the ſubject; by *Kelyng* and all the judges, in a ſanguinary reign; adopted by lord *Holt*: affirmed by *Staunford*, and approved of by all the abridgers, from judge *Fitzherbert* to lord chief baron *Comyns* incluſive. This univerſal and valuable principle of the penal law of *England*, that a man ſhall not be twice tried, and in jeopardy for the ſame *ſubſtantial* offence, is the beſt protection to the ſubject, intruſted in its conſtruction to the judges, and cannot be too jealouſly watched, or too anxiouſly guarded; otherwiſe it may happen that by nice verbal diſtinctions and circumſtantial differences, the firſt trial for the ſame ſubſtantial crime, would be only a dangerous rehearſal to a ſecond or a third, which muſt be fatal to the priſoner; the great object of our criminal law being to prevent an innocent man from ſuffering, rather than puniſh the guilty, upon the moſt diſtant poſſibility of his innocence. That obſervation of lord *Hale*, apparently more humane than juſt, has formed the genius and characteriſtic of our criminal law, that ninety nine guilty had better eſcape, than one innocent man ſuffer. We are all agreed that the plea ought to be allowed.

Henn J.—The queſtion here is, whether the commiſſion of a murder, and the procurement of it be not the ſame offence? I entirely think that they are ſubſtantially one and the ſame offence; upon this principle, that a perſon procuring a fact to be done, ſhall in contemplation of law be conſidered as having equally committed the fact. 1 *Hale* P. C. 238.

and

1788.
The King *againſt* Foy.

and upon this ground it has been determined, that a procurer of a treaſon may be indicted generally for committing the fact; as if one procure another to counterfeit the great ſeal, he may be indicted generally for having counterfeited it, and evidence of the procurement will ſupport the indictment. 12 *Co.* 82. 1 *Hale, P. C.* 238. If this then be clearly the law, does not this inference neceſſarily follow, that *Foy* upon the indictment for the murder, might have been found guilty upon evidence of his having procured the murder. If ſo, is it not equally a neceſſary conſequence, that by his being acquitted of having committed the murder, he is impliedly acquitted of having procured the murder, and therefore not to be again tried for the ſame offence. The ſtatute confirms this by placing the perpetrator and procurer of a murder in the ſame predicament, and conſidering them as guilty of the ſame offence.—Therefore I am of opinion that the plea ought to be allowed.

Sir *Samuel Bradſtreet.* J.—This point came before me at the ſummer aſſizes for the county of *Mayo*, two years ago. I had then little preparation upon the ſubject, and was at firſt againſt the plea; but upon conſideration and argument I changed my opinion. I have been gratified in my wiſh that the queſtion ſhould be brought before the court and argued; and I have now no doubt remaining upon it.—The priſoner is indicted for procuring the murder of *Hipſon*, and he pleads an acquittal upon an indictment for aiding and abetting; and to this plea the Attorney General demurs.—I ſhall conſider this caſe, firſt, as at common law; ſecondly, upon

1788. The King *againſt* Foy.

the ſtatute 10 H. 7. c. 21.—Firſt, conſidering it at common law,—the law is ſettled and admitted, even by thoſe who ſeem to doubt the reaſon upon which the authorities are founded, that if a man be indicted as principal in felony and acquitted, he may plead that acquittal, in bar to an indictment againſt him as acceſſory before the fact. In this caſe *Foy* was acquitted of aiding and abetting, which at this day makes a man a principal, though formerly it made him only an *acceſſory at the fact*. The firſt authority in the books on the ſubject is *Bracton*, who wrote in the later part of the reign of *Hen.* 3. His words fol. 139, are "*Fortia et præceptum ſunt quaſi ſequela facti principalis, et ita conjuncta facto et connexa, ut a facto non ſeparentur, quia vulnus, fortia et præceptum generant unicum factum. Non eſſet vulnus forté niſi adfuiſſet fortia; nec vulnus aut fortia niſi præceptum præceſſiſſet.*" *Fortia* is explained by *Foſter* (348) to mean aiding and abetting at the fact, and it is now conſidered in that light. The next is *Fleta lib.* 1. *cap.* 23. *fol.* 23. "*Homicidium eſt hominis occiſio ab homine nequiter facta; et poteſt quis corporaliter occidi facto et linguâ; facto, juſtitia, neceſſitate, caſu et voluntate; linguâ, præcepto, conſilio, defenſione.*" This book was written after the 13th of *Edward* I. and not much later. The next authority is *Fitz.* Coron. pl. 424, the *Iter* caſe in the 8th year of *Edw.* II. "*Nota quod quis poteſt acquietari pro morte alicujus per patriam, et hoc non obſtante, ex indictamento vel ſectâ alicujus de auxilio, abbetto, vel procuramento, poteſt ſuſpendi pro morte ejuſdem, ut patet de occiſione Henrici Giſors de London, ad ſectam mulieris ſuæ, &c.*"

1788.

The King against Foy.

&c." *Procuramentum* coupled with *de auxilio* and *abetto* does not exclude preſence, *ex vi termini*. If thoſe words mean acceſſories at the fact, that caſe cannot be law. The next authority is the year book, *T.* 2. *E.* 3. *pl.* 14. *fol.* 26, 27. *John Golde*, &c. &c. The word *que* there means "*leſt*." This caſe is ill abridged by *Fitzherbert*. He lays it down as determined there that the *envoyer* could not even be arraigned as acceſſory; but the caſe does not warrant that. *Melius eſt petere fontes quam ſectari rivulos*. The next authority is 27 E. 3 *pl.* 10. *Lib. aſſiz. fol.* 134, abridged by *Fitzherbert Coron.* pl. 200. and by *Brooke*, *Coron.* pl. 105. There a man indicted as principal in felony and found not guilty, was afterwards indicted for receiving the felon. This was the caſe of an acceſſory after the fact; but I mention it, becauſe it allows the principle, that the acquittal of a man as principal acquits him of all things concomitant and antecedent to the fact; and the reaſon given there for diſallowing the plea of the former acquittal, is ſtrongly in favour of the priſoner; viz. The receipt was not in *eſſe* at the time of the commiſſion of the felony. In the year book, H. 8 *Hen.* 5 *fol.* 6 and 7. *Hankford*, Chief Juſtice, lays down that an acquittal of a man as principal, is a bar to a ſubſequent proſecution for being acceſſory before the fact, on the ſuppoſition that a man may be found guilty as principal, upon evidence proving him acceſſory before the fact. I do not know of any actual deciſion againſt this opinion of *Hankford*. *Hale* indeed *ſays* it can hardly be denied that ſuch evidence is not ſufficient.—*Cheyne*, another judge, gives another reaſon,

1788. The King against Foy.

reaſon, viz. that he who counſels or aids a robbery is guilty of the robbery. So it leaves that ſtill not a decided caſe. The next is *Staunford*. lib. 2. ch. 36. *fol.* 105, which is an authority in point. The Solicitor General ſaid that *Staunford* ſeemed to reſt on *Bracton* only. But he does cite others and goes on, "and with this agrees *Bracton*. The next authority is *Crompton's Juſtice*, (which I take to be a new and enlarged edition of *Fitzherbert's Juſtice*) page 33. B.—The next is *Pulton de Pace Regis* 177. pl. 31.—"If a man is indicted as acceſſory before the fact, an acquittal of him as principal might be pleaded in bar." The next authority is *the Compleat Juſtice*, by *Richard Chamberlaine*, (of which there are ſeveral editions,) page 4.—The next is a book of received authority, *Trials per pais*, 2 vol. 592. A man acquitted as principal cannot be arraigned as acceſſory; but if acquitted as acceſſory, he may be arraigned as principal. *Kelyng* recognizes the law to be ſo, 25, 26. So likewiſe does *the Common and Statute Law of England*, by W. J. barriſter at law, pages 4, 5.—The next authority is *Hale*, in three places. *Hawkins* is the next. He has made ſome doubts, without examining the books. *Keilway* 107 and *Dalis*. 14, are the books that ſeemed to create the doubt. But that in *Keilw.* is not this caſe; all that relates to this queſtion is ſaid there *arguendo*, and not to the point. In *Daliſon*, the queſtion was, whether a verdict finding a man acceſſory, on an indictment againſt him as principal was good; and it was held that it was not. But the caſe does not ſay whether *evidence* ſhewing him acceſſory, was ſufficient

1788.

The King *againſt* Foy.

ſufficient to ſupport the indictment, or not. The next authority is *Blackſtone* in the 4th vol. of his commentaries, which is conſidered the weakeſt part of that work. The next is a repertory. *Viner's ab.* tit. *Acceſſory*, p. 121. He lays it down ſo, and ſo does *Comyns*, (4 Com. Dig. *tit. Juſtices.* T. 3.) a great authority! *Hargrave* in his notes on Co. Lit. paſſes great encomiums on *Comyns*. *Comyns* takes it to be ſettled, that if a man be indicted as principal and acquitted, he cannot be afterwards indicted as acceſſory before the fact; and yet now, upon a doubt expreſſed by *Foſter*, we are to unſettle the law! Though it were not founded in reaſon, it is law, and that is enough for us. The next is *Bolton's Duty of a Juſtice of Peace*. *Bolton* was Chief Baron in this kingdom. In part 2, 52. he lays down the ſame principle; and *Addington*, on the penal ſtatutes, p. 1. lays down the ſame. There is alſo a deciſion of a learned ſerjeant, (*Wood*) in the caſe of *The King* v. *Dogherty*. I believe he well conſidered the point, and went down prepared. As to the caſe of *Atkyns* 2 St. T. 792. He was tried for commanding, counſelling and abetting, and alſo for harbouring, comforting and maintaining; and there was another indictment againſt him as principal. He was arraigned on, and pleaded to that againſt him as acceſſory firſt. He was not then acquitted of any thing; ſo could not plead his acquittal.—If this plea be allowed, it is objected that evidence barely proving a man to be an acceſſory before the fact, ought to convict him on his trial on an indictment charging him as principal; but that ſuch evidence is not admitted to have that effect,

1788.
The King against Foy.

effect. As to this: there is no ſolemn deciſion determining that ſuch evidence is not ſufficient to convict in ſuch a caſe, and I own I ſhould have great doubts upon that point, were it to come before me. If indeed a man were charged as principal, and the principal had not been convicted or outlawed, and the perſon indicted turned out to be only acceſſory before the fact, I think that evidence would not be ſufficient. But ſuppoſe the principal had been convicted or outlawed, or were then on his trial; and another were on his trial for being preſent aiding and abetting, and it appeared that he was acceſſory before the fact, there I ſhould have great doubts whether that evidence would not ſupport the indictment. I do not know of any decided caſe againſt it; and the opinion of Ch. J. *Hankford* before mentioned ſeems otherwiſe.

Secondly: Suppoſe the offence were treaſon under the act; ſee whether it makes any variation. Though in high treaſon all are principals in the final end and iſſue of the proſecution, yet the principal in the ſecond degree, that is, he who adviſes or procures another to commit any other ſpecies of treaſon, except againſt the perſon of the king under the firſt clauſe in 25 *E.* 3, is merely an acceſſorial offender; and in mere acceſſorial and derivative treaſons, the very ſame equitable rules and principles prevail, and the ſame benefit of pleading is to be allowed, that is applicable to the caſe of acceſſory in felony, 1 *Hale* P. C. ch. 22. *Foſter* 3 *Diſc. ch.* 1. ſ. 1. Suppoſe the words *procure*, *provoke*, *ſtir*, had their common acceptation; thoſe charged with *procuring*, &c. are acceſſories; and on this equitable

able principle are intitled to the ſame benefit as acceſſories in felony. If murder were a treaſon in the intermediate ſtage, the jury could not find one indicted for murder guilty of a ſubordinate crime. My lord *Earlſfort* has ſtrongly ſhewn that procurement can only be a relative, derivative offence, which depends on the fact of another. 1788. The King *againſt* Foy.

An objection has been made to the demurrer. I do not think that it has weight. The demurrer only admits *facts*; but as to *offence*; as far as that includes the legal nature of the crime, it is not admitted; as far as it includes facts, the demurrer does admit it.

A caſe which happened in this kingdom furniſhes two rules. It was the caſe of *The King* v. *Mulligan* and *Standrin*, above thirty years ago. *Mulligan* and *Standrin* were indicted for murder. *Mulligan* had inſtigated *Standrin* who was indicted for the actual murder; *Mulligan* for aiding and abetting. *Standrin* was found guilty of manſlaughter: *Mulligan*, of murder. There evidence of procuring was admitted to ſupport the indictment againſt one as principal. Next the caſe ſhews that the procurer cannot be a ſubſtantive offender; for *Mulligan* was pardoned; becauſe his offence was connected with the occiſion by the principal, which was only *manſlaughter*. This caſe is not reported; and I only mention it to ſhew that it was the practice to indict procurers as principals.

I would add a few words on the caſe relied on by the Attorney General, to ſhew that the ſtatute operated only on the perſon, and not on the offence; and ſo aiders and abettors are not within it; and therefore that *Foy*'s life

1788. The King *againſt* Foy.

life was not in jeopardy on the former trial. The caſe is that of *Page* and *Harwood*, on the ſtatute of ſtabbing; a caſe of found law. It was there reſolved that aiders and abettors are not within that ſtatute. The words in 10 *Hen.* 7. *ch.* 21. are "*ſlee*" and "*murder.*" *Murder* is a legal word. An aider and abetter of a murder, is in the eye of the law a murderer, and does not come within that caſe. *Stab* is not a legal word. One who does not give the ſtroke, is not a ſtabber. If this ſtatute 10 *Hen.* 7. contained only the word *ſlee;* that not being a legal technical word, it might come within that caſe. *Foſter*, with regard to ſtatutes taking away clergy, *page* 355, &c. mentions that caſe, and alſo that of *Finch* and *Evans*, upon the ſtatute againſt ſtealing in dwelling houſes, and ſays, the reaſon why aiders and abettors are not held to be ouſted of clergy by thoſe ſtatutes, is, that the ſtatutes were very penal, and to be taken literally and ſtrictly; aiders and abettors are not named or deſcribed, and therefore could not be brought within the ſtatutes. But then he goes on—"The conſtruction which hath been conſtantly put upon the ſtatutes ouſting clergy in murder, robbery, rape and burglary hath been different. Aiders and abettors preſent have been always ouſted, and I admit they ought to be ſo. But theſe caſes widely differ from the former. In thoſe aiders and abettors are not once named, nor are they deſcribed by any terms importing that the legiſlature intended to ouſt them. In the others, the legiſlature hath made uſe of terms, which at the time of making the acts, and long before, were well known

known to include them. By theſe ſtatutes clergy is taken away from the ſeveral *offences*, deſcribed by *legal technical terms* of well known ſignification, *murder*, *robbery*, *rape* and *burglary*."—Upon the whole I am of opinion that there ought to be judgment for the priſoner. 1788. The King *againſt* Foy.

Bennett J. I concur.—Let the priſoner go quit.

EUSTACE *againſt* PURCEL & al' Executors of PURCEL. *Exchequer.*

Friday 6th of June. Euſtace *againſt* Purcel. In covenant by heir of the aſſigneeof the reverſion, he need not ſtile himſelfeither aſſignee, or heir of aſſignee.

IN covenant for not repairing and delivering up in good repair, at the expiration of the term, certain premiſes which had been demiſed to the teſtator, the plaintiff derived his title as heir to the grantee of the reverſion. To the declaration the defendant demurred ſpecially; aſſigning for cauſe, that though the plaintiff has ſhewn himſelf heir of the aſſignee, he has not called himſelf aſſignee, or heir of the aſſignee.

This was argued on the 12th of *November* 1787, (*abſente Yelverton*, Ch. B.) by Mr. *Downes* and the *Recorder* for the defendants; and by Mr. *M. Smith* and Mr. *Boyde* for the plaintiff.—It was again argued on the 6th of *June* 1788, by the Recorder for the defendants, and by Mr. *M. Smith* for the plaintiff.

For the defendants.—Where an action is brought upon a contract, by a perſon not a party

1788. party to it, but intitleing himſelf by matter ſubſequent, he ought to ſtile himſelf according to the character he ſues in. It is ſo of heirs, executors or adminiſtrators. Such an one, plaintiff, muſt not only ſhew himſelf to be ſuch, but muſt alſo call himſelf ſo. So aſſignees of bankrupts, *Evans & al.* v. *Mann. Cowp.* 569.—In *White* v. *Ewer. Cro. Eliz.* 823. in arreſt of judgment, in covenant, it was objected that though the plaintiff ſued as aſſignee, yet he did not name himſelf ſo. *Fenner* J. held it a ſubſtantial objection. The other three judges held it but matter of form. We admit that it is only form; but our demurrer being ſpecial, intitles us to the benefit of the objection. It is of conſequence to the court, that antient forms ſhould be adhered to, where adhering to them can do no harm, and may be of ſervice. The title of the declaration immediately informs the judge, of the nature of the action. This objection certainly is more material than that of the want of pledges in a declaration, which is a good cauſe of ſpecial demurrer †; ſo is any variance from

Euſtace *againſt* Purcel.

† Stat. 4 & 5 *Ann.* ch. 16 *Eng.*—6 *Ann.* ch. 10 *Iriſh.* enacts, "that no advantage ſhall be taken for default of entering pledges upon any bill or declaration, &c. except the ſame ſhall be ſpecially ſhewn for cauſe of demurrer." Yet in *Read* v. *Brookman.* 3 *Term Rep.* B. R. 157. Lord *Kenyon* ſays "that he remembered hearing a demurrer attempted to be argued, becauſe the names of *J. Doe* and *R. Roe* were not added to the declaration as pledges to proſecute, in ſupport of which it was ſaid, that in all the old books of entries there was no precedent to be found without them; but the court overruled the demurrer, ſaying that it ceaſed to be law when pledges ceaſed to be matter of ſubſtance." It ſeems difficult to account for that objection's,

1788.

Euſtace *againſt* Purcel.

from the uſual form. Aſſignee of the reverſion ought to be called ſo, and ſo are all the precedents, *Lutw.* 481. *Vidian* 117. An heir who ſues on a grant or covenant to his anceſtor and his heirs muſt be named heir, 5 *Comyns Dig. Pleader* 2 E. 1.—2 *Mod. Ent.* 39.—*Vidian* 133.—*Pleader's Aſſiſt.* 375.—*Lib. Plac,* 110, *Winch.* 112. 122. 137. *Richardſon's Prac.* 566.

For the plaintiff.—The only caſe cited to ſupport the objection, is that in *Cro. Eliz.* where the deciſion was that the objection was not a ſubſtantive one. Three judges indeed ſaid *arguendo*, that it was but matter of form. But they did not decide that it was ſo. The caſe of executors and adminiſtrators who ſue in *auter droit*, is diſtinct in principle from this. An aſſignee does not ſue in *auter droit*, but in his own right and for his own benefit. We admit that there are many precedents, as ſtated on the other ſide; but there are many that are otherwiſe, which were not objected to on that account. In *Aſhurſt* and *Strange* v. *Mingar*, *Lilly's Ent.* 135. 2 *Show.* 133. 2 *Jones* 144. the plaintiffs did not ſtile themſelves aſſignees, but ſhewed it. *Lilly's Ent.* 132. Covenant by ſurviving deviſee not intitled ſo. *Clift's Ent.* 225. 229. Debt by aſſignee of the reverſion. 2 *Mod. Ent.* 192. by deviſee of grantee of the reverſion. 2 *Inſtruc. Cler.* 326. a ſimilar caſe.—*Cro. Jac.* 240, it is ſufficient

jection's being attempted to be argued, if made on a general demurrer; in which caſe the ſtatute would be an immediate anſwer to it; and if it was made upon a ſpecial demurrer, the ſtatute ſeems to recogniſe its ſufficiency. *Vide* 2 *Wils.* 142, 143. 1 *Wils.* 226. *Hardwicke cas.* 300. *Dublin Ed.*---315. *Lon. Ed.*

1788. Euſtace *againſt* Purcel.

ficient to ſhew an aſſignment, though plaintiff does not intitle himſelf aſſignee.

(Upon the firſt argument an objection was made, which was abandoned on the ſecond; viz. that the plaintiff had not alledged, that the leſſee or the executors had notice of the aſſignment, and therefore the court would intend that they had no notice. The leſſee might have performed the covenant to the leſſor, or ſatisfied him and got a releaſe. The aſſignment was not a matter lying equally in the knowledge of both parties; therefore notice ought to be alledged. *Hard.* 42. 8 *Co.* 92. and 5 *Co. Mallory's caſe*, were alſo cited.—It was anſwered, that if ſuch averment were neceſſary, it could only be ſo, where the performance of the covenant was perſonal to the leſſor or his aſſigns, as the payment of rent. Here the covenant was to repair the houſe in a ſpecific manner. Be the reverſion in whom it might, the houſe was to be repaired. It is averred that it never was repaired. It is very different from the caſe of rent, which the leſſee might have paid to the leſſor after aſſignment, but even there the want of notice ought to come by way of plea *.)

Yelverton. Ch. B. If the objection were a good one, the plaintiff in ſuch caſes muſt intitle himſelf ſo as to ſuit every ſtep of the deraignment of his title. Since it is admitted that this is only a matter of form, and the precedents are both ways, over-rule the demurrer.

Per Cur. Demurrer over-ruled.

REBECCA

* So decided in *Watts & al'* v. *Ognell. Cro. Jac.* 192. *Vide* 1 *Term. Rep.* B. R. 385.

1788.

REBECCA SHAW, Widow, *againſt* RICHARD SHAW. *Exchequer.*

Same day. Shaw *againſt* Shaw.

A teſtamentary guardian can make a leaſe of the Infants lands for the minority.

IN Covenant for rent, the plaintiff declared that whereas by indenture made on the 13th day of *May* 1772, between the ſaid *Rebecca Shaw* by the name and deſcription of *Rebecca Shaw*, widow of the late *Charles Shaw* M. D. *as guardian to the children Judith and Rebecca Shaw*, of the one part, and the defendant of the other part, the ſaid *Rebecca Shaw* did demiſe, ſet, and to farm let unto the ſaid *Richard*, his executors, &c. *for and during the term, time, and ſpace of the minority of ſaid Judith and Rebecca Shaw*, from the 1ſt day of *November* then laſt paſt, at the annual rent of £.54, payable half yearly, on the 1ſt days of *May* and *November;* that defendant covenanted to pay the rent as aforeſaid; that by virtue of ſaid indenture, he entered on the ſaid 13th of *May* 1772, and was poſſeſſed; and from thence till the firſt day of *May*, 1786, continued poſſeſſed by virtue of ſaid demiſe. The breach aſſigned was—that on the 1ſt of *May* 1786, £.783 of the yearly rent aforeſaid, for fourteen years and an half then ended on ſaid day, *and during the minority of the ſaid Judith and Rebecca Shaw*, were in arrear and unpaid.'—The defendant demurred generally.

Mr. *J. Ball, for the defendant.*—The leaſe was made by the plaintiff *as guardian*, therefore it was of the minors lands: and ſhe muſt alſo

1788. Shaw *againſt* Shaw.

alſo have made it as teſtamentary guardian; for ſhe claims fourteen years and an half's rent; whereas ſocage guardianſhip laſts only till the infant attain the age of fourteen. I ſhall make two poſitions. 1ſt, That a teſtamentary guardian has no power to make a leaſe of the infant's lands, and therefore that this leaſe was void. 2dly, That the leaſe being void, the covenant to pay the rent reſerved on it, is alſo void.—As to the firſt; the ſtatute * which gives a father a power to appoint a guardian, mentions only the cuſtody and tuition of the child or children, and enacts that the guardian may take into his cuſtody, to the uſe of the child or children, the profits of the lands. So it gives him but a bare authority without any intereſt. It was ſo determined 2 *Wils.* 129. 135, *leſſee of Parry* v. *Hodgſon*. There the court were clearly of opinion, that a teſtamentary guardian cannot make a leaſe of the infant's lands, and that a leaſe by him was abſolutely void. This was ſo decided after full argument, and time taken by the court to conſider. No caſe upon the ſubject has occurred ſince. 2d point: Where a leaſe is void, a covenant to pay the rent is void; for it runs with the land†. *Knipe* v. *Palmer*. 2 *Wils.* 130, was an action of covenant by the committee of a lunatic for rent reſerved upon a leaſe made by the plaintiff to the defendant. The leaſe was held void, and the covenant alſo. The leaſe was void becauſe the committee had no intereſt in the

* 14 & 15 *Car.* 2 *ch.* 19. *Iriſh.*—12 *Car.* 2 *ch.* 24 *Engliſh.*

† *Vide ante.* 361. *French* v. *Langriſhe & al.*

the lands. That principle applies here; for the guardian had nothing in the land for her own benefit. Serjeant *Hewit* (Lord *Lifford*) argued there, that an action on the covenant lay, though the leaſe was void, and cited ſome caſes; but he was ſtopped by the chief juſtice, who ſaid that thoſe caſes were of covenants collateral to the land, but that this ran with the land. *Hut.* 16. *Drury* v. *Finch.* *Noy* 26 *Cox* v. *Dawſon.* 4 *Co. Beverley's caſe* ſhew that a committee of a lunatic cannot ſue, becauſe he has no intereſt in the land. It may be ſaid that this leaſe is by indenture, and therefore that we are eſtopped from making this objection. But though perhaps we could not plead *nil habuit in tenementis*, yet we might plead *non demiſit*, which would as effectually traverſe the plaintiff's title, and, on the iſſue thereon, the point would ariſe at the trial. There is another reaſon why we are not eſtopped: there is no eſtoppel where the verity appears on the ſame record. *Co. Lit.* 352. Here the truth appears on the declaration; therefore we are not eſtopped.

1788. Shaw. *againſt* Shaw.

Mr. *W. Lloyd*, *contra*.—A guardian in ſocage had power to make leaſes of the infants lands, 'till his age of fourteen years, 3 *Com. Dig. Guardian*, B. 4. 2 *Roll. ab.* 41. *Cro. Jac.* 98. It does not appear here, that the plaintiff was not guardian in ſocage. It is argued that ſhe was teſtamentary guardian, from the demand being for fourteen years and an halfs rent; but guardianſhip in ſocage may ſubſiſt after the age of fourteen, if no other guardian be ready to ſucceed, *Harg. n.* 13. *Co. Lit.* 88. *b.* In *Vaug.* 179, it was held that a teſtamentary guardian has the ſame

1788. Shaw *againſt* Shaw.

intereſt as a guardian in ſocage, and that their duties and power differ only in the *modus habendi*. 1ſt as to the duration; 2dly as to the perſons by whom they may be held*. Since then a guardian in ſocage could make leaſes 'till the infant attained the age of fourteen, a guardian under the ſtatute may make leaſes 'till the infant attain the age of twenty-one.—The caſe in *Wilſon* is a very looſe note, and from what is there mentioned, it appears not to be in point with the preſent. It was of a leaſe made by a guardian, to extend beyond the full age of the ward, and the queſtion aroſe upon its validity after that he had attained his full age: for *Bathurſt* J. is ſtated to have thought that the leaſe became void, when the minor became of age. Here the leaſe was only during the minority. In that caſe, alſo, it was held that a guardian by ſtatute, 'till the infant was twenty-one, and a guardian in ſocage, 'till he was fourteen years of age, had the ſame intereſt. If we cannot recover in this manner, we are without relief. We cannot diſtrain, for the leaſe expired in 1786; and in an action for uſe and occupation, we ſhould be defeated by our deed. If the covenant be bad, it muſt be ſo, either becauſe it is a *nudum pactum*; or, 2dly, to do ſomething illegal; or, 3dly, that it involves mutuality, and that the plaintiff's part has not been performed. But the firſt is out of the caſe; this being a ſpecialty. 2dly, to pay rent certainly is not illegal; and, 3dly, the defendant has enjoyed the land: and though he had not, he would be bound by the

* 1 P. W. 704. S. P.

the covenant. *Monroe* v. Lord *Kerry*. 1 *Brown* P. C. 334, is in point.—That was covenant for rent againſt *Monroe* on a covenant in a freehold leaſe to commence *in futuro*; there was no averment of livery of ſeiſin, entry or enjoyment, ſo that no eſtate paſſed to him; yet on the ground of there being an expreſs covenant, he was held liable. It is ſaid that the matter of avoidance of this leaſe appears on the declaration; ſo it did in that caſe. No inference can be drawn from 2 *Wils.* 130. applicable to this caſe, for that was upon a deed poll, and not upon an indenture; the pleading in covenant differs from that in debt. In debt the demiſe is poſitively averred: in covenant it is only recited by way of inducement.—Were guardians unable to leaſe the lands of infants, it would be attended with loſs to the infants, and injury to the public. It cannot be expected that guardians themſelves ſhould be either capable or willing to till the lands; and if they cannot make leaſes, the lands muſt remain untenanted and unprofitable.

1788. Shaw *againſt* Shaw.

(This was further argued on the following day, 7th of *June*, when it was objected, for the defendant, that though a guardian might leaſe during the minority; yet the preſent leaſe appeared to have been made to extend beyond the minority of one of the infants; for it was to laſt during the minority of *Judith* and *Rebecca*, that is, as it was argued, 'till both of them ſhould have attained their full age. But the court over-ruled this, and gave judgment for the plaintiff; diſtinguiſhing this caſe from that in 2 *Wils.* 129. 135—and holding that a teſtamentary guardian could make

1788. a leaſe of the minors lands to ſubſiſt during the minority.—*Ex relatione.*)

THE KING at the proſecution of Alderman JOHN FXSHAW againſt RICHARD GRIFFITH, Eſq; Sir JOHN FREKE, Bart. and HENRY HATTON, Eſq.—*King's Bench.*

Monday, 9th of June. The King *againſt* Griffith. Information for ſpeaking opprobrious, malicious, and contemptous words of a juſtice of peace in the execution of his office, in diſperſing rioters; for queſtioning and denying his authority; and for obſtructing and hindering him from diſperſing them and preſerving the peace, held to be too general.

THIS was an information ſtating, "That on the 13th day of *May*, in the 27th year of the reign of our lord the King, divers riotous perſons, and diſturbers of the peace of our ſaid lord the King, to the number of twelve and upwards, to the ſaid *Henry Boyle Carter* unknown, at *Merrion Street*, in the pariſh of *Saint Peter's* and county of the city of *Dublin*, with force and arms, did riotouſly, routouſly, and unlawfully aſſemble themſelves together, to diſturb the peace of our ſaid lord the King, to the terror of the peaceable ſubjects of our ſaid lord the King; and the ſaid perſons being ſo riotouſly, routouſly, and unlawfully aſſembled, as aforeſaid, *John Exſhaw*, Eſq. who was then and there one of the juſtices of our ſaid lord the King, aſſigned to keep the peace within the ſaid county, and alſo to hear and determine all and ſingular felonies, &c. and who was then and there preſent, together with certain conſtables of our ſaid lord the King, within the pariſh aforeſaid, he the ſaid *John Exſhaw* did then and there uſe his utmoſt endeavours to diſperſe the

1788.

The King against Griffith.

the ſaid rioters, and to preſerve the peace of our ſaid lord the King; nevertheleſs *Richard Griffith*, Eſq. *Henry Hatton*, Eſq. and Sir *John Freke*, Bart. all of the city of *Dublin* aforeſaid, and each of them, well knowing the premiſes, but wilfully and maliciouſly intending the authority of the ſaid *John Exſhaw*, as much as in them and each of them lay, to diminiſh, and him the ſaid *John Exſhaw* to bring in contempt, then and there, certain opprobrious, malicious and contemptuous words of the ſaid *John Exſhaw*, who was then and there a juſtice of our ſaid lord the King, as aforeſaid, and who was then and there acting as a juſtice of our ſaid lord the King, as aforeſaid, to keep the peace of our ſaid lord the King, as aforeſaid, did ſpeak, and with a loud voice did proclaim and publiſh; and the authority of the ſaid juſtice of our ſaid lord the King, to diſperſe the ſaid rioters ſo aſſembled as aforeſaid, did queſtion and deny; and the ſaid *R. G. H. H.* and Sir *J. F.* and each of them, did then and there obſtruct, oppoſe, moleſt, and hinder the ſaid *John Exſhaw*, who was then and there in the due execution of his ſaid office as aforeſaid, to preſerve the peace of our ſaid lord the King, and to diſperſe the ſaid rioters and diſturbers of the peace of our ſaid lord the King, ſo aſſembled as aforeſaid, to the evil example of all others in like caſes offending, and againſt the peace of our ſaid lord the King, his crown and dignity. Whereupon, &c. &c. To this information the defendants ſeverally pleaded, not guilty. Upon the trial, at *niſi prius* before lord *Earlsfort*, the defendants *Hatton* and *Freke* were acquitted; but there was a verdict againſt

1788. The King against Griffith.

againſt *Griffith*. After an unſucceſsful motion for a new trial, a motion was made to arreſt the judgment. It was argued on the 3d, 5th and 7th of *June*, by Mr. *Duquery*, Mr. *Downes*, Mr. *M. Smith*, and Mr. *Curran* for Mr. *Griffith*; and by the Attorney General, Serjeant *Hewit*, the Hon. Mr. *Butler*, Mr. *Egan* and Mr. *Beresford* for the King.

For the defendant.—In every indictment, the charge ought to be ſo certain, that 1ſt, the defendant may know what to defend; 2dly, that the court may proportion the puniſhment to the offence; and, 3dly, that the defendant, if he be indicted again for the ſame fact, may plead *auterfois acquit*, or *convict*. 3 *Salk*. 186. 1 *Salk*. 375. S. C. 2 *Hawk*. P. C. *ch*. 25. ſ. 59. 2 *Stra*. 999. The ſame certainty is required in informations; and unleſs the court diſregard thoſe principles, judgment in the preſent caſe muſt be arreſted. The defendant has been found guilty of the whole charge in the information; the firſt part of which is for ſpeaking certain opprobrious, malicious, and contemptuous words of a magiſtrate; but neither the words, nor the ſubſtance of them is ſtated. In 1 *Roll. rep*. 79 *Bagg*'s caſe, a charge of ſpeaking divers ſcandalous words of a magiſtrate, without ſaying what words, was held bad. The King v. *How*. 1 *Stra*. 699. S. P. In Dr. *Sacheverel*'s caſe 5 St. T. 833, the judges held it neceſſary to ſet out the particular words. It is true, that was combated in *Layer*'s caſe, 6 St. T. 331, where it was held ſufficient to ſtate the ſubſtance of the words. In the King v. *Revel*. 1 *Stra*. 420, and in all the precedents in *Tremaine* 73—81, the

1788.

The King *againſt* Griffith.

the words ſpoken are ſtated. It is charged here that the defendants ſpoke contemptuous words of the proſecutor. It is not ſtated that they were ſpoken in the hearing of any one. And there is a diſtinction between words ſpoken *of* a magiſtrate, and words ſpoken *to* him, King v. *Pocock* 2 *Stra.* 1157. To make the ſpeaking an offence, it muſt be to the magiſtrate, actually; or conſtructively, as by being addreſſed to the rioters. It is not ſtated here to have been ſo, and the court will not preſume it. The defendant's cenſure of the magiſtrate might have been for taking a wrong method to diſperſe the rioters. But it is ſaid that the words are not the ground of the charge, and therefore need not be ſtated; that the charge is, the obſtruction, and the ſpeaking of the words is only aſſigned as the mode of the obſtruction. But the ſame objection lies; for the words themſelves ought to have been ſtated, and ſtated to have been ſpoken under ſuch circumſtances, that the court might ſee that they could be the mode. Whereas there is nothing ſtated here, but the proſecutor's conſtruction of them; and in fact the queſtion does not occur here, for the ſpeaking of the words is not ſtated inſtrumentally; it is not charged that *thereby* he obſtructed the magiſtrate. The next part of the charge is, queſtioning and denying the proſecutor's authority. This is liable to the ſame objections. It is not ſtated, how and upon what grounds they queſtioned his authority. Merely queſtioning and denying the authority of a magiſtrate is no offence. It is only giving an opinion, erroneouſly perhaps; but it is no offence. The court frequently hears

1788. The King *against* Griffith.

hears the authority of magiſtrates, and even its own, queſtioned. It only induces the court to decide more deliberately. The next part of the charge is, obſtructing the magiſtrate; but no act of obſtruction is ſtated. In all criminal charges there ought to be, both a generical deſcription of the offence, and alſo a ſpecifical one of the mode of committing it. It is ſo in high treaſon, whether it conſiſt in intention or in overt act. So in felony; to charge a man that he *murdered*, &c. is not ſufficient; that is only the generical deſcription; you muſt alſo charge the mode; otherwiſe he could not plead *auterfois acquit*, or *convict*. Trace this to miſdemeanours. In the King v. *How*, abuſing the magiſtrate was the *genus*, and the mode was by ſcandalous words. It was admitted that the words ought to have been ſet out; but the court alſo held, that to ſupport the charge of obſtructing the magiſtrate, ſome act of obſtruction ought to have been ſtated. That caſe is exactly ſimilar to this. The doubt of the court, whether *retardavit* would amount to an allegation of obſtruction, ſeems hardly warranted; for, no doubt, *retarding* a magiſtrate from his duty, with a ſpecific ſtatement of the means would be held an offence. A ſpecification is neceſſary only of the offence committed by the defendant, and not of what would have been done, were it not for the obſtruction. But it is ſaid that the whole charge in the information is to be taken together, and that then it appears that the mode of obſtructing was by ſpeaking opprobrious words, and denying the magiſtrates authority. But it is not ſo ſtated in the information. It is not ſtated that

1788.

The King *against* Griffith.

that he thereby obſtructed. Suppoſe an indictment for poiſoning and murdering; for rnnning through the body and murdering; or hanging and murdering. It would be abſurd. It ought to ſpecify and deſcribe the means, viz. poiſoning, running through, &c. and then conclude "and ſo, &c. felonioufly did kill and murder, &c. Even if it were charged that he obſtructed by ſpeaking opprobrious words, the objection recurs that the words themſelves are not ſet out, to ſhew the court that they could be the mode. If it be ſaid that opprobrious words have that tendency; that does not apply here; for it is not alleged that the words were ſpoken to the mob, or in their hearing: ſo that there is no room for intending that the magiſtrate was obſtructed by them; even if an indictment or information could be made good by intendment and argument; which it cannot, King v. *Knight* 1 *Salk.* 375. Try this information by the principles laid down in *Salk.* and in *Hawkins.* How could the defendant know from it, what he is to defend? He is charged with words; what words? he is not informed. He is charged with obſtructing a magiſtrate; how? by what act? that does not appear. The charge is obſtruction generally. So it was in *King* v. *How* and held bad. 2dly, Suppoſe judgment had gone by default; how could the court proportion the puniſhment? One act of obſtruction may be very ſlight; another very outrageous, and require a large fine. 3dly, Suppoſe the defendant were again proſecuted. How could he plead *auterfois acquit* or *convict?* If it be ſaid that it might be done, with averments.

Then

1788. The King *againſt* Griffith.

Then the caſes cited are not law: but they have not been any where impeached. *Tremaine*'s Ent. 273, for obſtructing the execution of a warrant, ſets out the mode of obſtructing. The caſes of a common barretor and of a ſcold, are the only ones where a general charge is ſufficient. Thoſe ariſe from the nature of the offence, which conſiſts in repetition. And there the inconvenience ariſing from the generality of the charge, is guarded againſt by the court; for the defendant has a right to a rule on the proſecutor, for a note of the particular facts he means to prove, 5 *Mod.* 18*.—An indictment for being a common oppreſſor is too general, 2 *Keb.* 24. 42, or *communis deceptor*, 6 *Mod.* 311. So for extortion, without ſetting out a particular act. *Holt.* 363. 2 *Stra.* 999. S. P. In *Holt.* 353, it was charged that the defendants aſſembled to break the peace, and broke the *Guildhall* door, but without ſufficient certainty to ſhew it a public offence, ſo judgment was arreſted. Since the charge of obſtruction can neither be referred to, nor though referred to, can be ſupported by the preceding part of the information; it muſt be conſidered as a ſpecific diſtinct charge, referring to ſome *act* done; and therefore ought to be laid to have been done *vi et armis*. Obſtructing a magiſtrate does imply force, and where offences in their nature involve force, the words *vi et armis* are neceſſary. It is otherwiſe where it would be abſurd to charge force, as where the charge is for conſpiracies, cheats, eſcapes, or ſuch like, or nuſances committed

* 1 *Term Rep.* B. R. 754.

committed upon a man's own ground. 2 *Hawk.* P. C. *ch.* 25. ſ. 90. In the former caſes the omiſſion of *vi et armis* was held fatal at common law. That it was ſo, is expreſsly recited in the *Engliſh* ſtatute, 37 H. 8. ch. 8. which enacts, "that theſe words, *vi et armis*, viz. *cum baculis, cultellis, arcubus et ſagittis*, or other ſuch like, ſhall not of neceſſity be put in any indictment or inquiſition." That ſtatute does not cure the defect in informations. 2 *Hale* P. C. 187; and it has been doubted whether, in the caſe of indictments, the ſtatute cured the want of theſe generical terms, or, only the want of the ſpecifical expreſſions, *baculis, cultellis, &c.** The want of the words *vi et armis* remains fatal, even in indictments, in *Ireland*, as it does in informations in *England*; for a ſtatute ſimilar to that of H. 8. has not been enacted here. Even in civil caſes an act of parliament was neceſſary to cure the omiſſion of theſe words, though after verdict†. There are alſo errors in the proceſs and the award of it. The award is of a *Venire*, (and the *Venire* accords with the award in this,) to cauſe a jury to come to try the *iſſue* aforeſaid; whereas there were three ſeveral iſſues joined. The award and the *Venire* impowered the jury to try but one of the iſſues, and which of them was uncertain. The proſecutor might have had either a joint *Venire* or ſeveral *Venires*. Since he has choſen a joint one, it ought to have been ſpecial and mentioned to be for the trial of the ſeveral iſſues aforeſaid. *Gree* v. *Rolle*, 12 *Mod.*

1788.

The King *againſt* Griffith.

* P 2 *Hawk.* P. C. ch. 25. ſ. 91. 3 P. W. 498.

† 17 & 18 *Car.* 2. ch. 12. *Iriſh.* 16 & 17 *Car.* 2. ch. 8. *Engliſh.*

1788.
The King against Griffith.

12 *Mod.* 654. Again; the award is, that the ſheriffs cauſe a jury to come before the lord the King, *at the King's courts*, on &c. which is wrong, from the tranſitory nature of the court. It ought to have been *ubicunque*, *&c.* The award is the act of the court, and cannot be amended; this is a criminal caſe. Next, there is a variance in this reſpect, between the award and the *Venire*, for though the award is as before mentioned, the *Venire* itſelf commands the ſheriffs, "to cauſe to come before us, on &c. *whereſoever we ſhall then be* in *Ireland*, twelve, &c." This variance is fatal. *Brigges* v. *Tompſon*, *Yelv.* 60. There, on an information on a penal ſtatute, the award was of a *Venire* returnable *ubicunque*, &c. but the *Venire* was made returnable *coram nobis*, omitting the words *ubicunque*, *&c.* and for this variance judgment was arreſted. The *Venire* that iſſued was not warranted by the award, ſo it was as if no award had been made. So here the *Venire* is not warranted by the award. But it is ſaid that the defendant has ſlipped his time. How? becauſe he did not challenge for this cauſe, will it be ſaid that he cannot now avail himſelf of it? Would the court, in the caſe of the King v. *Keon*, have waſted two or three days on the argument of ſuch points, if it had thought them waved.—Another objection to the *Venire* is, that it commands the ſheriffs, to cauſe to come, &c. twelve free and lawful men, (not ſaying *freeholders*) of the body of their county, every of whom ſhall have forty ſhillings ſterling at leaſt, (without ſaying *by the year*,) in lands, tenements, or rents. N. This was mentioned only on the motion in

in arreſt of judgment; and was taken no notice of in the argument. 1788.

The King against Griffith.

For the King. Of all the objections made to arreſt the judgment upon this information, that which ſeems to have the greateſt weight, is, that the offence is not charged with ſufficient certainty. It muſt be admitted that the ſame certainty is neceſſary in informations as in indictments; that is, what upon a fair and reaſonable conſtruction may be called certain, without recurring to poſſible facts which do not appear. *Doug.* 153. The doctrine of what certainty is required in indictments, is alſo ſtated by *De Grey*, Ch. J. in the King v. *Horne*, *Cowp.* 682. "The charge, ſays he, muſt contain ſuch a deſcription of the crime, that the defendant may know what crime it is which he is called upon to anſwer; that the jury may appear warranted in their concluſion of "Guilty," or, "Not Guilty," upon the premiſes delivered to them; aud that the court may ſee ſuch a definite crime, that they may apply the puniſhment which the law preſcribes." The preſent information, it is ſubmitted, has all thoſe requiſites. It is for obſtructing a magiſtrate in diſperſing a riot. It ſtates "that divers riotous perſons did, *vi et armis*, riotouſly aſſemble themſelves together, to diſturb the peace, and that the juſtice came to diſperſe them, that nevertheleſs the defendants wilfully and maliciouſly intending to diminiſh his authority, then and there ſpoke opprobrious, malicious and contemptuous words of him; denied his authoriy to diſperſe the rioters, and then and there, did obſtruct, oppoſe, moleſt and hinder him in the execution

1788. The King against Griffith.

cution of his office, to diſperſe the rioters ſo aſſembled, as aforeſaid." Here the whole mode of obſtruction is ſet out. The words "as aforeſaid," refer to the whole preceding charge. It is objected that the words are not ſet out. If this were a proſecution merely for words, they muſt have been ſet out; for unleſs upon the charge it appears that they were *contra bonos mores* and the public peace, they are not indictable; if they are, they are indictable, though not actionable. *Comb.* 66. King v. *Darby*, and in ſuch caſe the court will preſume an evil intention. But this is not an information for words. The ſpeaking of them is only mentioned as the mode which the defendants made uſe of to obſtruct the magiſtrate, and as evidence of the malicious intent, which is the giſt of the proſecution, and the only queſtion for the jury; and the ſubſtance and purport of them are ſufficiently ſtated for that purpoſe; it is charged that they were malicious, contemptuous and opprobrious; coupling them with the intention, they conſtitute an offence. The court will favour an indictment, if a ſufficient charge appear on any part of it, becauſe it is *pro bono publico*, *Comb.* 66. 1 *Stra.* 700 S. P. If extreme niceties are allowed, what ſignifies a judgment of acquittal? If the judgment againſt *Griffith* be arreſted; away goes the verdict of acquittal of *Hatton* and *Freke*. The information, if it be bad for the crown, is bad againſt it. As to the caſe of the King v. *How*, (which is alſo reported, 2 *Seſs. Caſ.* p. 31, caſe 35,) it is plain that the word *retardavit* could not ſupport an indictment; otherwiſe a man might be indicted for making

ing a long ſpeech to a magiſtrate. Beſides there no mode of obſtruction was ſtated; nor did it appear from the facts alledged, that the magiſtrate was in the execution of his duty. Here it is expreſsly ſtated, that he was obſtructed in diſperſing rioters. In that caſe the court could not connect the ſpeaking opprobrious words, as the means, with the charge of obſtruction. They were in diſtinct counts. The firſt count was held defective for not ſetting out the words; and the ſecond, becauſe it ſtated no act of obſtruction. Here the charge is all contained in one count; the import of which is, that the defendant obſtructed the magiſtrate by the means of opprobrious and contemptuous words, and denial of his authority. But it is not neceſſary to connect the ſeveral parts. The contempt of his authority by words, may be conſidered merely as matter of aggravation of the obſtruction, which is an offence at common law, and is ſufficiently ſpecified by the words, "did hinder to preſerve the peace and diſperſe the rioters." If this had been for aſſaulting a magiſtrate, the mode need not be expreſſed. Here is a charge of a criminal intent to obſtruct the magiſtrate and diminiſh his authority. In the King v. *Powel*, 2 *Blacks.* 787. *Powel* was convicted of forging a receipt, with an intent to defraud *Sykes*. In arreſt of judgment it was objected, that the manner how the fraud was to be committed, was not ſet forth; nor the facts which were neceſſary to ſhew how the receipt was to operate ſo as to defraud; but merely the intent to defraud, in general; it was held ſufficient to aver a general intent to defraud a certain

1788.
The King *again* Griffith.

1788.

The King *againſt* Griffith.

certain perſon, which intention muſt be made out by facts, in evidence, at the trial.—The judgment on this might be pleaded to a ſubſequent proſecution, by the help of averments, *Dyer.* 285. *pl.* 38.—As to the objection, that the obſtruction is not laid *vi et armis*; it is ſurpriſing that it ſhould be made in this age. It is doubtful whether it was ever a good objection. *Hawkins* ſeems to think the ſtatute 37 *H.* 8. unneceſſary.—They are but form, and may be ſupplied by others. They are implied by the word *reſcuſſit*, *Cramlington's* caſe. *Cro. Jac.* 345. 2 *Buls.* 208. They are not neceſſary in an appeal of death. 2 *Hawk.* P. C. *ch.* 23. ſ. 85. Nor in an indictment for a riot, K. v. *Wynd.* 2 *Stra.* 834. Here they are implied; the information concludes, *contra pacem*; and the charge is obſtructing, oppoſing and hindering a magiſtrate in diſperſing rioters; therefore you muſt preſume force; for nothing but that ſhould prevent a magiſtrate from doing his duty in ſuch caſe. In an indictment for ſtopping a way, they were held not neceſſary. *Pop.* 206. Here the original riot is laid *vi et armis*, and the court muſt preſume it continued throughout. It is charged that the magiſtrate was then and there in the execution of his duty diſperſing it, and that the defendant then and there obſtructed him, ſo that he became as it were an acceſſory to the riot, and therefore a principal *ab initio*; the jury might have found him guilty of a riot. It is objected, that the award (and *Venire*) is to try the *iſſue aforeſaid*. This refers to the iſſue knit between the coroner and the three defendants.

"Iſſue"

1788.

The King *againſt* Griffith.

"Iſſue" is *collectivum*. Beſides it is cured by appearance. Then it is ſaid that the award is, &c. *at the King's Courts*, and that it ought to be *ubicunque*, &c. It is true the King may hold his court where he pleaſes; but then the jury ought to be informed whither they are to come*. As to the variance, the *Venire* is amendable by the award, by the common law. After verdict, it is too late to make theſe objections.

On *Monday* 9th of *June*. 1788, the court delivered their opinions unanimouſly for arreſting the judgment.

Lord *Earlsfort*, Ch. J.—(After ſtating the information.) Before I go into a conſideration of what appears upon the face of the information, let me premiſe a few words, as to what does not appear; and as to thoſe particulars in which it differs from informations and indictments for the like offence, as to all the precedents which I have ſeen; 1ſt, It does not ſtate the offence to have been committed *vi et armis*. 2dly, It does not ſtate the opprobrious words, either literally, or ſubſtantially; by their tenor or import. 3dly, It does not ſtate the words ſpoken *of* the magiſtrate, to be either in his hearing, or in the hearing of the rioters, or any others. 4thly, It does not annex any adverb or term of criminality to the ſpeaking of the words, or to the obſtruction, ex. gr. that he maliciouſly

* To the caſe of *Cox* and St. *Albanes*, 1 Mod. 81. there is ſubjoined this note. "*Twiſden*. There was a *Venire facias* returnable *coram nobis apud Weſtm.* whereas it ſhould have been *ubicunque fuerimus*, &c. yet becauſe the court was held here, it was held to be good. *Hales*. I remember it." This was not cited.

1788. The King *againſt* Griffith.

ciouſly ſpoke, or wilfully and maliciouſly proclaimed. The adverb of crimination is annexed merely to the participle *intending*. 5thly, There is no act of obſtruction, moleſtation, oppoſition, or hindrance ſet forth in the information; and 6thly, There is no circumſtance laid in the information, as a *cauſe* whereby the magiſtrate was obſtructed; and as we are agreed in opinion, that the judgment ought to be arreſted upon one ground of defect, viz. that the obſtruction is inſufficiently ſet forth and laid in the information, I ſhall not ſpeak to any other exception, taken either to the information, or to the record, however ſerious ſome of them may be. My opinion upon this defect, I ground upon principles; upon the authority of caſes which never have been denied or queſtioned; and upon precedents.—The principles that govern this caſe, though to be met with in all the books of criminal law, which treat of this ſubject, yet I rather chooſe to reſort to in the caſe of the King v. *Horne*, in *Cowper* 672 to 682; not only becauſe they are ſtated in ſupport of the unanimous opinion of the judges, by Ld. Ch. J. *De Grey*, upon a queſtion put to them, on a writ of error to the lords; but alſo becauſe this caſe has been cited and ſeems to have been relied on by all the gentlemen concerned for the crown in the preſent caſe. That caſe was an information for a libel, and the information not only charged the wicked intention, but ſtated preciſely that *Horne* wickedly and maliciouſly did write and publiſh a falſe and ſcandalous libel; and the libel is ſet out *totidem verbis*. And there it is ſaid by the court, that

1788.

The King *againſt* Griffith.

that the defendant may give in evidence, that the words were uſed in a different or qualified ſenſe. Now how can he be prepared to do ſo, if the words are not ſet out, and he knows not what words are to be charged againſt him. Says Lord Ch. J. *De Grey*, the charge muſt contain ſuch a deſcription of the crime, that the defendant may know what crime he is called to anſwer; that the jury may appear to be warranted in their concluſion of guilty, or not guilty; and that the court may ſee ſuch a definite crime, that they may apply the puniſhment which the law preſcribes."—"As to the *matter* charged; whatever circumſtances are neceſſary to conſtitute the crime imputed, *muſt be ſet out*."—"It is likewiſe true, that in all caſes, theſe *facts* which are deſcriptive of the crime, muſt be introduced upon the record by *averments*, in oppoſition to *argument* and *inference*." Now, what conſtitutes the crime of obſtructing a magiſtrate in his office? Surely ſome word or fact tending to obſtruct, and deſcriptive of that obſtruction. Where then are thoſe words or facts to be found? Certainly no where upon the face of this information.—The King v. *How*, I conceive to be directly in point with the preſent. Its authority has never been doubted; it is ſupported by principles, and was adjudged under circumſtances which juſtify its being adopted, as it has been, by other books, and by the compilers of principles upon criminal law. That was an information for certain opprobrious and ſcandalous words ſpoken of a juſtice in the execution of his office, *et quia ipſum retardavit in executione officii ſui*. The court there ſeem to murmur

1788. The King against Griffith. at the feebleneſs of *retardavit*, which however certainly means *impeded*; but that was not the ground of their arreſting the judgment, for they ſay, but ſurely ſome *act* or other muſt be ſet out. This was the opinion of the editor of *Hawkins*, in the laſt edition. B. 2. ch. 25. ſ. 57. page 321. "So an indictment for words ſpoken of a juſtice in the execution of his office, muſt ſet out the words; alſo, if it be for obſtructing him, it muſt ſhew by what act it was done," and he cites King v. *How*. Sir *John Strange* who reports that caſe, was concerned for the proſecution; and the reaſons of the court eſtabliſh principles, viz. that the defendant may be prepared to meet the charge; that the court may judge of the puniſhment and of its degree by the degree of guilt, and that the party accuſed may, after an acquittal or conviction, be able to plead ſuch conviction or acquittal to a ſubſequent proſecution for the ſame crime. I ſhall apply the principles of thoſe two caſes, and compare the caſe of the King v. *How* with the preſent caſe, more particularly when I come to examine the arguments of counſel for the proſecution, ſtated as objections. The caſe in *Comb.* 66 *King* v. *Darby* was an information for words, and there the words were ſet out, and the general poſition eſtabliſhed was, that words not actionable were yet indictable, if *contra bonos mores*; but that caſe cited by the proſecutor's counſel, ſhews that the words muſt be ſet out. The next caſe cited by the proſecutor's counſel, was the King v. *Lyme Regis*. *Doug.* 153, where Mr. Juſtice *Buller* ſtates lord *Coke*'s idea of certainty in legal pleading to be, where the thing charged appears

1788.

The King *againſt* Griffith.

appears upon the face of the record, without recurring to poſſible facts which do not appear. I ſhall by and by apply that principle to the preſent caſe. The next caſe cited to this point of the caſe, was the King v. *Powel*, 2 *Blacks.* 787. The indictment there was, that *Powel* falſely made, forged and counterfeited a certain receipt as follows, that is to ſay, and ſet out the receipt. 1ſt. objection was, that it was not ſaid, "in the words and figures following." The court determined that one was as explicit as the other. The ſecond objection, which comes nearer to the preſent caſe, was, that the manner how the fraud was to be committed, or the facts which were neceſſary to ſhew how the receipt was to operate ſo as to defraud *Sykes*, were not ſet out; but merely the intent to defraud in general. The judges held it was ſufficient upon that ſtatute, (for it was upon 2. *Geo.* 2.) to aver a general intention to defraud a certain perſon, which intention muſt be made out by facts in evidence on the trial. In anſwer to that caſe, it would be ſufficient to ſay, that the words preſcribed by the ſtatute as deſcriptive of the offence, were accurately followed; but the *fact* was ſet out which *Powel* did, viz. that he forged the receipt; the only thing left for the jury, was to collect the intention by evidence. The laſt caſe cited to the above point, by the proſecutor's counſel, was the King v. *Royce*, 4 *Bur.* 2073. There the indictment was, that *Royce* with force and arms, did begin to demoliſh and pull down a dwelling houſe: the preciſion of which, ſo far as the caſe goes, is an authority againſt the preſent information. But

1788. The King against Griffith.

But it has been argued by the profecutor's counfel, that the principles of the King v. *How*, and thofe ftated in the King v. *Horne*, do not apply to quafh the prefent information, but tend to fupport it; for, 1ft it is afferted that the intention is the gift of this information, and the only fact neceffary to appear upon it. Anfwer. That would be cruel and abfurd. The truth is, the intention muft be coupled with the fact; for the intention without the fact would be abortive, and the fact without the wicked intention, might not be criminal.—2dly, It is infifted, that coupling the intention with the words, they form an offence.—Anfwer.—How can that be judged of by the court, but by fetting out the words or their import, which, with the intention, conftitute the offence.—3dly, It is faid this is an information for obftructing only, and the words are merely evidence of the fact of obftructing.—Anfwer.—It is far otherwife laid in the information. It is not ftated *whereby* i. e. by which words the juftice of peace was obftructed. There is no caufe ftated, as there fhould always be in an information or indictment, as the proper premifes to ground the conclufion or effect upon, which effect or conclufion is denominated the offence. The grand jury, in an indictment, find that the defendant, traverfer or prifoner, did this and that thing by fuch and fuch means, and fo they find the crime by conclufion from thofe premifes. Thus the whole fhould appear to the court upon the information; as Lord Ch. J. *De Grey* fays, the facts and circumftances which conftitute and are defcriptive of the offence; the means

means by which the offence was committed; the cauſe appearing with the effect; the premiſes with the concluſion. Otherwiſe it would be neceſſary only to ſay ſuch a man was murdered; ſuch a man was robbed; ſuch a magiſtrate was obſtructed. But all indictments muſt go farther, and ſhew how murdered; how robbed; how obſtructed. This is ſupported by another principle; a grand jury find upon probability of facts: theſe facts muſt be ſet out to warrant the concluſion of their finding. But it is ſaid a breach of the peace is ſubſtantially averred. —Anſwer.—We are left to collect what that was, by referring to ſome poſſible fact not appearing upon the record: which is juſt what Juſtice *Buller* ſays, is Lord *Coke*'s idea of uncertainty. But, ſays the Attorney General, the words "as aforeſaid" connect the whole.—Anſwer.—It is clearly otherwiſe. They refer only to the next antecedent, viz. to "*aſſembled, as aforeſaid;*" "*in the execution of his office, as aforeſaid;*" but theſe words can never connect the words, as a cauſe, with the obſtruction as the effect. If they connected the whole, it would only be neceſſary to have placed them at the end; which would ſufficiently expoſe this conſtruction. It is ſaid again, that the act of obſtructing is ſet out by the words, "did hinder him to preſerve the peace and to diſperſe the rioters."—Anſwer.—Firſt, Theſe words are ſcarcely *Engliſh*, to obſtruct a man to, to oppoſe him to, to moleſt him to, to hinder him to preſerve the peace and diſperſe rioters; but next, they ſtate no act of the defendants; they only ſtate what the juſtice was doing or about

1788.

The King *againſt* Griffith.

1788. The King *against* Griffith.

about to do. Next, it was ſaid, the riot pervaded every part of the information; that the defendant was a rioter, and the jury might have found him guilty of a riot.—Anſwer.—This is not an information for a riot. Nothing can ſhew the uncertainty of the pleading, ſo much as the argument; for if the jury might have found any of the four offences upon this information, viz. riot, denial of authority, contemptuous words, or obſtruction in his office, to a demonſtration the charge is not certain or ſufficiently laid in the information. I ſhall therefore conclude my opinion in the words of Lord *Mansfield* in the opening of his, in the King v. *Horne*; whatever the defendant's degree of guilt may have been; how ſtrongly ſoever it may have been proved, if he is intitled to a legal advantage from a literal flaw, God forbid he ſhould not have the benefit of it."

Henn J. declared his concurrence in the opinion delivered by his lordſhip, and added —I take it that the omiſſion of the words *vi et armis* is ſufficient to arreſt the judgment. The queſtion is, what is the common law upon the point? Ita ppears from 2 *Hawk.* P. C. 343. that in indictments for offences tending to diſturb the peace, they are neceſſary. The ſtatute 37. H. 8. is not in force here, ſo it ſtands as at common law. It is ſaid that when they are implied they are not neceſſary, and 2 *Stra.* 834 was cited.—That was for a riot, which does imply force. The words there neceſſarily imply force; but what analogy has that to this? Do the words, obſtruct, hinder, or oppoſe, neceſſarily imply force. Another objection is the variance between

1788.

The King *against* Griffith.

tween the award and the *venire*, and the caſe cited from *Yelv.* ſeems an expreſs authority.

Sir *Samuel Bradſtreet*, J.—A fatal objection to this information, is, that there is no ſtatement of a riot, legally; it does not ſay in what there was a breach of the peace. There are certain ſpecific circumſtances to make a riot. The offence of thoſe aſſembled ſhould be more preciſely ſtated; otherwiſe it does not appear that the magiſtrate was in the execution of his duty. A little more preciſion would be neceſſary. With reſpect to the great objection—(perhaps there are fatal errors in the proceſs, but I ſhall not go into that,—) my lord *Earlsfort* has ſo fully diſcuſſed that point, that I ſhall not enlarge upon it. It is aſſerted, that taking the whole information together, it muſt be taken that the obſtruction was by the words; that is, by inference; whereas it is laid down in 1 Ld. *Ray*, 529, that argumentative informations are ill, for that very reaſon, becauſe all charges ought to be ſhewn preciſely in pleading. In *Doug.* 425. The King v. *Smith* and others, it was held that to obſtruct the execution of powers granted by act of parliament, is an offence at common law, and there, in the indictment, the particular obſtruction is ſet forth, and the act of obſtruction is ſet forth, viz. by fixing piles; not only the obſtruction, but the *quomodo*. In 2 *Bur.* 1232. an indictment for keeping a diſorderly houſe was held good; but there were other circumſtances ſtated. It was ſaid that in an indictment for an aſſault, the aſſault is not laid particularly. No; for aſſault *ex vi termini* expreſſes the mode. It is ſaid that in Rex v. *How*, it does not appear

1788. The King against Griffith.

that the juſtice was in the execution of his office: but that is not the point made by the court.—It does not appear that the information there conſiſted of two counts.

Bennett J. If the obſtruction was merely by the words, they ought to have been ſtated. The defendant might then have ſhewn how they were ſpoken; he might have ſhewn that they were ſpoken in confidence. But if it was intended to let in other circumſtances, the information in its texture was inſidious; for the defendant could not know what charge to meet. It is unneceſſary to ſay any thing upon the other objections. We have nothing to do with the event of this motion with reſpect to the verdicts of acquittal of the other defendants. We are all unanimouſly of opinion that the charge is too general.

Judgment arreſted.

End of TRINITY TERM.

TABLE

OF THE

PRINCIPAL MATTERS

Contained in this Volume.

A.

ACCESSORY.

1. AN acquittal of a man upon an indictment againſt him as principal in a felony, is a bar to an indictment againſt him as acceſſory to the ſame felony, before the fact. 540.
2. *Quære* whether evidence ſhewing the priſoner to have been guilty as acceſſory before the fact, be ſufficient to convict him upon an indictment againſt him as principal. 599, 600.
3. An acquittal upon an indictment for being preſent, aiding and abetting, at a murder, under 10 *Hen.* 7. *ch.* 21. is a bar to an indictment under the ſame ſtatute, for procuring the murder to be committed. 540.

AMENDMENT.

Where in the title of a declaration, in the *Exchequer*, in treſpaſs *vi et armis*, it was alleged that the plaintiff complained in treſpaſs *on the caſe*; after verdict for the plaintiff upon the general iſſue, and *ſon aſſault demeſne*,

the court allowed the title to be amended by ſtriking out the words, "*on the caſe.*" 203.

APPEAL, *Commiſſioners of.*

Commiſſioners of appeal are competent to decide, whether a trial before ſub-commiſſioners of the revenue was regular. Therefore where, upon an information, the ſub-commiſſioners allowed in bar of proceeding thereon, a former ſentence of acquittal, (which being ſigned by only two ſub-commiſſioners, the proſecuting party conſidered as a nullity, and brought the cauſe on again to trial,) but the commiſſioners of appeal remanded the information to be tried, a prohibition to the ſub-commiſſioners was refuſed. 82.

APPOINTMENT.

1. A deviſed to B. for life, remainder to his firſt and other ſons in tail male, remainder over in truſt to convey the premiſſes, and every or any part thereof, to ſuch child or children of teſtator's daughter, and her then huſband, *other than, and except their eldeſt ſon for the time being*, and the iſſue male or female of ſuch child or children, (except before excepted) for ſuch eſtates, and in ſuch ſhares, and ſubject to ſuch limitations as ſhe, from time to time, by any deed or deeds, or by her will ſhall appoint; and for want of appointment by her, or for ſo much as ſhall not have been appointed by her, then as her huſband ſhall from time to time, by any deed or deeds, or by his will, appoint; and for want of ſuch appointment, or for ſo much as ſhall not have been appointed, then as their eldeſt ſon for the time being ſhall appoint. The huſband by his will, (his wife having died without appointing,) appoints to his younger ſons, by name, in tail, with croſs remainders in tail; and if all his ſaid younger ſons ſhould die without iſſue, then to his daughters. He dies leaving his ſons the appointees, ſtill younger ſons; afterwards one of them becomes the only ſurviving ſon, the reſt being dead without iſſue; and then the truſt eſtate veſts in poſſeſſion by the death of B. without iſſue male. The daughters of the appointer claim the eſtate, conſidering the appointment to their ſurviving brother as defeated, by his being an eldeſt ſon for the time being, and ſo excluded by the will of A, and the other brothers the appointees

appointees being dead without iſſue. But it is decreed that the appointment to him continued undiſturbed. "Time being" means the time of the appointment's being made. The appointees were as if named in the will of A. The daughters can claim only under the appointment by their father, who limits to them in the event of all his ſons, the appointees, dying without iſſue, which has not happened. 29.

2. Teſtator having a power of appointing lands to ſuch of his ſons, in ſuch ſhares, and for ſuch eſtates, and with ſuch limitations over as he ſhould think proper, (in default of whoſe appointment the lands were to go to his firſt and other ſons in tail male ſucceſſively,) appoints them by will to A. his eldeſt ſon for life remainder to his firſt and other ſons in tail male, ſucceſſively; remainder *ſubject to a charge of £.1000 to the teſtator's daughter*, to B. and C. his ſecond and third ſons, for their lives, as tenants in common, with ſeveral remainders in tail to their iſſue. That charge of £.1000 is void, and B. and C. having ſeveral other deviſes and bequeſts made to them by the ſame will, are not bound to make their election on the teſtator's death, nor to confirm that charge, when the remainder to them veſts in poſſeſſion. 49.

ASSETS.

1. Where an executor pleads a judgment outſtanding, and the plaintiff replies aſſets *ultra*; upon the iſſue thereon the defendant may cover aſſets to the amount of the judgment, though it be for the penalty of a bond conditioned for the payment of a leſs ſum. 88.

2. *Non aſſumpſit* ſingly, pleaded by an executor, is an admiſſion of aſſets. 230.

ASSUMPSIT.

1. *Aſſumpſit* for uſe and occupation lies on an implied promiſe, founded on the enjoyment of the land &c. by the defendant, by the permiſſion of the plaintiff. 268.

2. But to ſupport ſuch action there muſt be a privity of contract, expreſs or implied, between the plaintiff and defendant: and where the defendant's poſſeſſion has been adverſe, ſuch action will not lie, nor will evidence of the plaintiff's title be applicable to maintain the action in ſuch caſe. *Ibid.*

3. But where there was privity of contract ſubſiſting between the defendant and another, from whom the plaintiff derives, there evidence of the plaintiff's title is material. 268.
4. At common law where there was a demiſe reſerving a certain rent, caſe did not lie for the rent. *Ibid.*
5. Afterwards caſe was held to lie, provided there was an *expreſs* promiſe to pay the rent; for which promiſe the leaſe and enjoyment under it were held a ſufficient conſideration. *Ibid.*
6. But where there was ſuch demiſe, the law would not *imply* a promiſe to pay the rent; and therefore in ſuch caſe, *aſſumpſit* would not lie for the rent, on an implied promiſe. *Ibid.*
7. Where there was no demiſe reſerving a certain rent, the law did imply a promiſe, and *aſſumpſit* lay to recover the value of the lands for the time, without an expreſs promiſe. *Ibid.*
8. Since 11 *Geo.* 2. *ch.* 19. *Eng.*—23 & 24 *Geo.* 3. *ch.* 46. *Iriſh*, *Aſſumpſit* lies though there was a demiſe or agreement reſerving a certain rent, and no expreſs promiſe; provided the demiſe or agreement be not by deed. *Ibid.*
9. So that if the demiſe or agreement be by deed, to ſupport an *aſſumpſit* now for the rent, there muſt be an expreſs promiſe proved, as before the ſtatute. *Ibid.*

ATTACHMENT.

1. In B. R. when the defendant ſubmits to an attachment, the proſecutor has not a right to inſiſt on exhibiting interrogatories to him 295. 99.
2. Upon a motion to ſet aſide an attachment for irregularity, the party attached need not appear in cuſtody. 307.
3. Perſons attached in *cuſtodiam* cauſes, may have perſonal interrogatories exhibited to them. 399.
4. In the *Exchequer*, where a party anſwers perſonal interrogatories as upon an attachment, the oppoſite party may except to the anſwers, at the bar, if they be ſhort or evaſive. 386.

See CUSTODIAM—POSSESSORY BILL.

ATTORNEY.

1. A client indebted to his attorney cannot oblige him to produce his papers, &c. in court, though only for the purpoſe

purpoſe of uſing them there, and not to take them out of the attorney's poſſeſſion. 171.
2. Declaration on a bond given to an attorney for an untaxed bill of coſts, to make him give up papers &c. is refuſed to be ſet aſide; but the bill is ordered to be taxed, and the bond to ſtand a ſecurity for the taxed bill. 239.

ATTORNEY-GENERAL.

Previous notice to him of motions to plead to eſtreats, or to diſcharge fines, is neceſſary. 317.

See CUSTODIAM. 23.

AVOWRY.

See PLEADING at law. 5. 6. 7. 12. 14. 1

B.

BAIL.

1. A poſitive affidavit of the debt is neceſſary to entitle the plaintiff to ſpecial bail. 87.
2. Bail on bringing a writ of error is not required from an executor. *Vide* 215.
3. A defendant in an inferior court, on removing the cauſe by *habeas corpus*, muſt put in bail above. 241. 475.
4. He muſt do it according to to the rule of the court, and will not be ſuffered to put in bail before a judge of aſſize. 475.
5. A previous affidavit is neceſſary to warrant marking a writ for ſpecial bail, for goods ſold and delivered. 256.
6. But the defendant's putting a rule on the plaintiff to ſhew cauſe of bail, is a waver of the objection to the want of ſuch affidavit. *Ibid.*
7. An affidavit of a debt, made before a Burgo-maſter in *Holland*, certified by him, and accompanied by an affidavit of the plaintiff's agent, that he believes it to be true, is not ſufficient to hold to bail. 393.

BANKRUPT. See MORTGAGEE.

BARON AND FEME.

1. Where, upon a marriage, the husband makes a settlement upon the wife, and her portion is vested in trustees to provide for the issue in certain specified portions, in specified events; in cases unprovided for it belongs to the husband. 61.
2. Where a bill is filed against husband and wife, he cannot answer separately without leave of the court; to obtain which, he himself must make the affidavit, whereon the motion is grounded. 105.

BILL OF EXCHANGE.

1. A declaration setting out a good bill of exchange within the custom of merchants, and not otherwise alluding to the custom, is good after verdict. 195.
2. The defendant having effects of A. in his hands, accepted a bill drawn by A. in favour of B. whom he admits to be a fictitious person. A. passed the bill with B.'s name indorsed to C. who indorsed the bill to the plaintiff. Under these circumstances, proof of the handwriting of the payee was dispensed with. 465.

C.

COMMISSIONS *to examine.*

In equity causes, commissions cannot go to examine witnesses, *de bene esse*, who are about to go abroad, though it might be proper at law. 395.

COMMISSIONERS OF APPEAL. See APPEAL.

COSTS.

1. A perſon out of the kingdom, upon obtaining leave to take defence to an ejectment, muſt give ſecurity for coſts. 104.
2. The traverſer of an inquiſition is not intitled to coſts. 123.
3. When a perſon gets leave from the court of *Exchequer*, to traverſe an inquiſition, he muſt give ſecurity for coſts. 477.
4. In ejectment, upon a judgment by conſent, the plaintiff may releaſe his damages, and have judgment, (without a writ of inquiry) and execution for his coſts *de incremento*. 229.
5. Proceedings in ejectment are not to be ſtaid, 'till the plaintiff pay the coſts of another ejectment between the ſame parties, in another court, where he was defendant. 240.
6. In the *Exchequer*, coſts on a *remanet* do not abide the event. Each party abides by his own coſts. *Qu.* 256.
7. Where a decree has been affirmed by the Lords, with coſts, and the order of affirmance has been received by the court below, the party may proceed in the office, by *ſubpœna* and attachment, to compel the payment of the coſts, without a motion in court. 385.
8. The plaintiff getting judgment for part of his demand, is intitled to his whole coſts, without deduction, though the defendant gets judgment upon demurrer, on pleading in bar to the reſt of the plaintiff's demand. 505.
9. In treſpaſs for taking the plaintiff's turf, he is intitled to full coſts, though the damages be under 40 ſhillings. 473.

See ATTORNEY.

COVENANT.

1. In covenant for rent, plaintiff declares on a demiſe for years to the king, by indenture (not ſtated to have been inrolled) between the leſſor and the defendants, (commiſſioners of the barracks,) on behalf of the king; that the defendants covenanted that they on behalf of the king, would pay the rent; that by virtue thereof the defendants entered, &c. This declaration held to be bad. 361.

2. The

2. The defendant, in a deed together with others, ſeverally covenanted to pay the ſixth part of the expence that the plaintiff ſhould be at in obtaining a diviſion of certain lands, and in redreſſing the injuries which all the parties had ſuffered. The plaintiff avers that he had obtained a diviſion and redreſſed the injuries which the defendant had ſuffered; this held to be bad, on ſpecial demurrer, for not averring that the plaintiff had redreſſed the injuries of all the parties. 383.
3. Declaration in covenant for part of a quarter's rent, without ſhewing that the reſt was paid, is bad, on ſpecial demurrer. 374.
4. In covenant by the heir of the aſſignee of the reverſion, he need not ſtile himſelf in the title of his declaration, either aſſignee, or heir of the aſſignee. 603.

See conſtruction of DEEDS. RENEWAL.

CUSTODIAM.

1. The leaſe to the *cuſtodee* from the crown, and the injunction to put him into poſſeſſion, are mere form and are never executed. 398.
2. The only thing to affect the tenants of the lands granted in *cuſtodiam*, is the general order to pay their rents to the *cuſtodee*. The inquiſition does not attach the rent in their hands. 398.
3. Neither does the grant in *cuſtodiam*; and therefore before the ſervice of that order, though after the grant in *cuſtodiam*, a third perſon may diſtrain the tenant without being guilty of a contempt. 480.
4. If a tenant after ſervice of the order upon him, neglect to pay his rent to the *cuſtodee*, he is liable to an attachment, which is the ordinary proceſs in ſuch caſes. See the caſes referred to under this title *paſſim*.
5. Where the *cuſtodee* comes to make abſolute a conditional order for an attachment againſt a tenant for not paying his rent to him, he muſt produce the order on the tenants, and the affidavit of the ſervice of it on the perſon ſought to be attached. 396.
6. Unleſs it appear to the court by affidavit that the ordinary proceſs has been found inſufficient, the court will not give leave to eject or diſtrain the tenants. 477.
7. But the court will give the *cuſtodee* (not the outlaw though the cuſtodee conſent) leave to bring ejectments for

for nonpayment of rent, in the name of the outlaw, if the rents cannot be otherwiſe procured. 310.

8. If the order on the tenants to pay their rents to the *cuſtodee* be ſerved within a year after it was granted, it need not be revived, though the *cuſtodee* lie-by for four years, without applying for the rents. 308.

9. So the tenant notwithſtanding ſuch lying-by of the *cuſtodee*, is attachable, for not paying his rent to the cuſtodee. 308.

10. The affidavit upon which cauſe is to be ſhewn on behalf of a tenant, againſt an attachment for not paying his rent to the *cuſtodee*, muſt be made by the tenant himſelf. 312. 313.

11. It muſt ſtate his term and rent. 396.

12. It muſt ſtate what lands he holds of the outlaw, and ayer that he holds none other of him. 313.

13. It is no cauſe againſt an attachment for not paying his rent to the *cuſtodee*, that the cuſtodee proceeded to the outlawry after the outlaw had gone abroad. 481.

14. A tenant attached for not paying his rent to the *cuſtodee*, may inſiſt on having perſonal interrogatories exhibited to him. 399.

15. It is a contempt of the court of *Exchequer* to take any ſtep to affect the lands granted in *cuſtodia*, without leave of the court, as long as the *cuſtodiam* ſubſiſts, tho' the outlaw be dead. 478.

16. If the court give leave to bring an ejectment for thoſe lands, it mu t be brought in the court of *Exchequer*; and it is a contempt to bring it in any other court. 306. 478.

17. A purchaſer under a decree for a ſale upon a bill of foreclоſure, and put into poſſeſſion by injunction of the court of chancery, of lands granted in *cuſtodiam* before the filing of the bill, (the attorney general not being a party thereto) is attachable for interfering with the rents; for the inquiſition being prior to the filing of the bill, the attorney general ought to have been made a party to the bill. 307.

18. The tenant's being diſtrained by a third perſon without leave of the court, is no excuſe for the tenant's non-compliance with the order to pay his rent to the *cuſtodee*; he muſt nevertheleſs pay the *cuſtodee*, and apply to the court for an attachment againſt the perſon who ſo diſtrained him. 118.

19. It being doubtful whether certain lands diſtrained by a third perſon are a ſubdenomination of thoſe granted in cuſtodiam or a diſtinct denomination, the court will

not make abſolute the rule for an attachment, obtained by the tenant who holds both denominations, but will permit the tenant to pay his rent into court to be apportioned by the officer in caſe the lands turn out to be different denominations. 116.

20. A jointreſs muſt apply for leave to diſtrain, as well as annuitants, head landlords, &c. 318.

21. An head landlord is intitled in the firſt inſtance to an abſolute rule to permit him to diſtrain, or eject for his rent out of the lands; whereas others can have but a conditional rule. 400.

22. But the affidavit whereon his motion is grounded, muſt deny colluſion againſt the *cuſtodee*; as muſt the affidavits of others applying for leave to diſtrain or eject. 120.

23. The Attorney General's conſent is neceſſary upon ſuch motions. 120.

24. A perſon claiming only an annuity out of the lands, cannot traverſe the inquiſition. 125.

25. But he may obtain leave to diſtrain. 125.

26. Where the deed of annuity was executed after the *teſte* of an extent, though prior to the inquiſition thereon, yet the annuitant cannot diſtrain; for the title of the crown takes place from the *teſte* of the writ. 400.

27. An *Elegit* creditor of the outlaw, whoſe inquiſition was prior to the inquiſition on the outlawry, is permitted to bring an ejectment. 315.

28. Otherwiſe if his inquiſition be ſubſeqnent, or even found on the ſame day, for in this caſe the title of the crown takes place. 315.

29. But where ſuch creditor, after judgment in ejectment upon the *elegit*, lay by upwards of two years without further proceeding, the court refuſed to give him leave to iſſue an *habere*. 119.

30. The cuſtodee having purchaſed the outlaw's intereſt in the lands, an *elegit* creditor is allowed to bring an ejectment. 305.

31. A mortgagee or aſſignee of a mortgagee, though out of poſſeſſion, denying, in his affidavit, colluſion, is intitled to leave to traverſe the inquiſition. 309.

32 *Note*. Upon ſuch application, the deeds muſt be produced in court, and the mortgage appear to be a ſubſiſting one.

33. A receiver cannot be appointed of *cuſtodiam* lands without conſent. 309.

34. Mortgagee

44. Mortgagee permitted to eject or diſtrain for rent out of *cuſtodiam* lands; the tenants refuſing to pay their rents to any one. 314.

35. *Qu.* Whether the aſſignees of the outlaw, who was a trader, have the eſtate veſted in them from the outlawry, ſo as to prevent a title's ariſing to the crown from it, for the benefit of a ſubject to whom the prerogative is lent to obtain ſatisfaction for his own private debt. The court thought it an improper queſtion to be decided on a motion, and left it for a plea to the inquiſition. 316.

36. A perſon who gets leave to traverſe the inquiſition muſt give ſecurity by recognizance for the payment of coſts, in caſe the event of the traverſe ſhould be againſt him. 477.

37. But if he ſucceed on the traverſe, he is not intitled to coſts. 123.

38. It is a contempt in a ſubſequent *cuſtodee* to interfere with the rents of the lands before a prior *cuſtodee* be ſatisfied. 124. 311.

39. And the prior *cuſtodee* muſt apply for an attachment againſt him. He cannot move that the ſubſequent *cuſtodee* ſhould account for, and pay over to him what he has received. 124. 311.

40. It is a contempt in a ſubſequent *cuſtodee* to procure in his own cauſe an order for ſetting the lands, whilſt a prior *cuſtodiam* is in force. 311.

41. If there be two *cuſtodiams*, notice of a motion by the ſecond *cuſtodee* for an order to ſet the lands muſt be intitled in both cauſes. 315.

42. If a ſubſequent *cuſtodee* apprehend colluſion between the outlaw and the prior *cuſtodee*, he may ſerve a rule upon him to account, and proceed when the other is ſatisfied. 316.

43. A ſubſequent *cuſtodee* cannot get rid of a prior *cuſtodiam*, by traverſing the inquiſition. 396.

44. The tenant is to pay his rent to that *cuſtodee* whoſe order was firſt ſerved upon him, though the others inquiſition was prior; for the priority of the inquiſitions is a queſtion between the *cuſtodees* only.—N. here the order firſt ſerved was dated before the other. 397.

45. A head-landlord having evicted for non payment of rent, the outlaws term, need not apply to ſet aſide the *cuſtodiam*. 317. 479.

46. Where the *cuſtodiam* is diſſolved, there is no occaſion for an *amoveas manus*. 401.

47. The death of the outlaw can be pleaded by the tertenant only. 314.
48. The outlaw himſelf, or the tertenant are the only perſons intitled to apply to remove the king's hands. 480.
49. A perſon intitled to diſſolve a *cuſtodiam*, may do it of courſe in the office on paying the coſt. 481.
50. The court grants conditional orders for attachments, without previous notice of the motion. 478.
51. In all notices in *cuſtodiam* cauſes, the cuſtodee muſt be ſo entitled. 116.
52. If the declared tenant at a ſetting of *cuſtodiam* lands under an order of court, neglect to take out leaſes, and give ſecurity by recognizance for the rent, he is liable to a rule upon him to compel him, and to an attachment for the contempt. 478.
53. By a rule of the court; at a ſetting of *cuſtodiam* lands, under an order, no perſon is to be declared tenant but an attorney of the court, or a perſon certified by ſuch attorney to be ſolvent, and for whom he is to be reſponſible.

D.

DEBT.

Debt on bond conditioned for performance of covenants. Plaintiff aſſigns a breach in his replication, and gets a verdict without any aſſeſſment of damages; he may enter judgment for the penalty. 238.

DECLARATION, title of.

See AMENDMENT. COVENANT. 4.

DEEDS, *conſtruction of.*

1. No words in any deed or inſtrument, which may have a ſignificant and operative meaning, without injuring the

the natural and obvious ſenſe of any other part of the deed or inſtrument, ſhall be rejected as nugatory and redundant. 160.

2. When two or more deeds or inſtruments act upon one and the ſame ſubject mat.er, they ought to be conſidered as one and the ſame inſtrument; and each is to be made auxiliary to the other, in order to come at the true meaning of both, in like manner as one part of the ſame deed or inſtrument ought to be made auxiliary to the other, in order to come at the true ſenſe and meaning of the whole. 160. 161.

3. When any deed or inſtrument is of doubtful or ambiguous conſtruction one of the beſt ways of explaining it is by referring to the act of the parties to that deed or inſtrument. 161. 135.

DEEDS, *delivery of.*

1. Where the original delivery of a deed was not void, but had an effect the deed is not capable of a new delivery. 416. 424. 457.

2. Circumſtances may be equivalent to any actual delivery. *ibid.*

DEMURRER.

1. In the *Exchequer*, a demurrer to a bill muſt be ſet down within four days, to be argued; otherwiſe the court will ſet it aſide on motion. 395.

2. If the defendant demur to the whole diſcovery ſought by the bill; and it appear that plaintiff has a right to a diſcovery as to part, the demurrer muſt be over-ruled. 84.

3. To a demurrer for charging ſeveral and diſtinct matters againſt ſeveral defendants, the defendant muſt join a denial of combination, though the bill charge it only formally. 85. 376.

4. To a bill by a rector, againſt ſeveral, for diſcovery and payment of tithes ſubtracted, and to be decreed payment in future, a defendant demurred for that it charged ſeveral and diſtinct matters againſt ſeveral defendants, and tended to draw the queſtion of ſubſtraction from its proper juriſdiction. The court over-ruled the demurrer for its informality; for it's not denying combination, and alſo becauſe the plaintiff is intitled to the diſcovery. 376.

5. Demurrer

Demurrer lies to a bill againſt a cuſtodee for an account, for that the attorney general is not made a party thereto. 387.

6 *Demurrer to evidence.*—In ejectment, plaintiff derives under a leaſe for 99 years, if any of three lives ſhall ſo long live, conditioned to be void, if the tenant do not within a year after the fall of a life, ſurrender the term abſolutely, or upon condition that the ſurrender ſhall be void, if the ſurrenderee do not (within three months after the delivery thereof, with the renewal fine, and an engroſſed draft of a ſimilar leaſe for a renewal,) execute the ſaid draft. Leſſor covenants to execute it, and that in default thereof, the ſurrender ſhall be void, and the tenant hold for the remainder of the ſaid term. The defendant demurs to the plaintiff's evidence, as ſhewing that two of the lives had dropt, without the tenants performing the condition. The court of *Exchequer* thought that the plaintiff had given evidence, from whence the jury might have inferred that the tenant had performed the condition, or that the landlord within the year had diſpenſed with it, and therefore overruled the demurrer.—This judgment was affirmed in the *Exchequer chamber*, 432. 436.

7. Demurrer to evidence admits not only thoſe facts which are directly ſworn to and ſtated on the record, but all concluſions of fact to which the evidence is admiſſible, and to which it is properly relevant and applicable. 454.

8. If the evidence be relevant and applicable to a particular concluſion, and fit to go to the jury thereupon; that concluſion is admitted. It is for the court to decide whether the evidence has any reference to ſuch a concluſion; but if, in the opinion of the court, it has ſuch reference, the court cannot weigh the credibility of witneſſes, or the truth or probability of facts. The party is to be in as good a ſituation as if he had a ſpecial verdict, compriſing all thoſe facts expreſsly found, which might properly have been inferred from the evidence. 455.

9. But it cannot be extended to concluſions, as to matters not of record, to be drawn from that to which the evidence does not apply, and which lying merely in the ſuppoſed knowledge of the jury, the court, not being poſſeſſed of any material to judge upon, could form no opinion of. 452.

10. Demurrer to evidence has fallen into diſuſe, becauſe it leaves to conjecture what might or might not have been inferred by a jury. 437. 438.

11. It does not preclude the party againſt whom it is offered, from any legal defence, though it may ſometimes furniſh againſt the party demurring the admiſſion of a ſtronger concluſion in point of fact, than a jury might have drawn, if it had been permitted to decide. 452.

12. Upon an ejectment no ſpecial iſſue is joined; the whole of the title of the parties is opened by the general iſſue; and the evidence muſt be applicable and applied to every matter to which the title adduced extends. 458.

13. Therefore in ſuch actions, (and for money had and received) the court, upon a demurrer to evidence, is to take it that the evidence was applied to what would ſupport the parties title, and to every thing the party giving it, ſeeks by his action. 429.

14. To an indictment for procuring a murder, the priſoner pleads an acquittal upon an indictment for aiding and abetting, and avers that the treaſons deaths and murders in the two indictments, are the ſame treaſon, death and murder; a general demurrer to the plea, only admits the identity of the facts, but not of the legal nature of the crime. 601.

DEVISE.

1. Teſtator by his will makes ſeveral deviſes and bequeſts to his wife, whom he thereby appoints his executrix and reſiduary legatee, and directs a certain part of his real eſtate to be ſold to pay his debts and legacies, in caſe his perſonal eſtate ſhould be inſufficient. Afterwards, his property being conſiderably increaſed, he, by a codicil, deviſes lands to his wife during widowhood, "which lands" ſays he "are to be free from all incumbrances; and I charge and incumber all my real and freehold eſtates, except the lands before named in this codicil, with all the debts I owe by bond, judgment, or other ſpecialty, and direct that my executrix ſhall pay my ſimple contract debts and arrears of rent, out of my perſonal eſtate." The perſonal eſtate is exempted from the payment of all debts, except ſimple contract debts, and arrears of rent. Decreed *contra* in the *Exchequer*. 319. Decree reverſed by the Lords. 482.

2. Parol evidence is not admiſſible to ſhew that it was the teſtator's intent to exempt the perſonalty from the other debts. 327. 328. 482.
3. The ſpecialty debts were decreed a charge on lands deſcended from the teſtator, in exoneration of thoſe deviſed by him. 482.
4. The teſtator having by his will deviſed all his lands to A. ſubject to an annuity for his wife, and afterwards by a codicil deviſed part of thoſe lands to B. and C. confirming all his deviſes and bequeſts in favour of his wife; ſhe ought not to be injoined from reſorting to this part of the lands for her annuity, if ſhe pleaſes. Decreed *contra* in the *Exchequer*, 354, &c. but the decree was reverſed by the Lords. 482.
5. In pleading a deviſe, it is ſufficient to ſtate that the teſtator "duly made and publiſhed his laſt will and teſtament in writing," without ſtating the ſolemnities required by the ſtatute of frauds. 497.

See APPOINTMENT. ELECTION. SETT-OFF.

E.

EJECTMENT.

1. In ejectment for nonpayment of rent, judgment by default and execution, the arrear having been aſcertained by affidavit before a commiſſioner, are good, and deprive the tenant of a right of entry. 1.
2. *Tender* of the coſts and arrear, within ſix months does not give the tenant a right to enter. He muſt, within ſix months, either *actually pay* the arrears and full coſts, or depoſit them in a court of equity on filing a bill; otherwiſe he is for ever barred and foreclоſed. *Ibid.*
3. An annuitant cannot take defence to an ejectment for the lands whereon the annuity is charged; but a truſtee who has the legal eſtate may. 98.
4. Upon judgment by conſent, the plaintiff may releaſe his damages, and have judgment without a writ of inquiry

inquiry, and execution for his coſts *de incremento.* 229.

5. A perſon having lain by for a year after an *habere* was executed, without any reaſon for his laches, ſhall not be let in to take defence. 236.
6. Notice of trial mentioning the name of the caſual ejector, inſtead of the real defendant's, is bad; and nonſuit for the defendant's not appearing to confeſs leaſe, entry and ouſter, therefore ſet aſide. 236.
7. Six months having elapſed ſince execution in ejectment for nonpayment of rent; a mortgagee of the tenant's intereſt, is put into poſſeſſion before the expiration of nine months after the execution, upon payment of the arrear and coſts to the landlord. 258.
8. Tenant at will is not intitled to any notice to quit 292.

ELECTION.

1. Where a deviſee takes a gift under a will, the law annexes a condition to the gift, that he ſhall not diſpute any other part of the will, even though that other part gives away from him ſomething to which he had an undoubted right, but that he muſt make his election whether he will renounce the particular gift to him by the will, or abide by the will altogether. But this rule has many exceptions. 53.
2. *Firſt*; where the teſtator himſelf annexes a condition to the gift. 53.
3. *Second*; where the deviſee does not diſturb the deviſe *in toto*, but only claims an excreſcent intereſt out of the eſtate, (as dower) and then ſuffers it to go according to the diſpoſition made thereof by the will. 55.
4. *Third*; where it may be collected from the whole will, that it was not the teſtator's intention to exclude the deviſee claiming a right contrary to the letter of the will, from any other benefit under it. 55.
5. *Fourth*; where the teſtator bequeaths a preſent gift to a remainder-man after an eſtate tail, and by the ſame will either gives the lands to another, having no power to give them, or ſubjects the remainder to a charge to which he had no power to ſubject it; in neither caſe is the remainder-man ſubject to the equity of making his election whether he will renounce all benefit under the will, or do all in his power to make good the deviſe of the re-

mainder in the one caſe, or confirm the charge in the other. 55.
6. Theſe tacit conditions are to be conſidered as they ſtood at the death of the teſtator, and the implication of them muſt be a neceſſary one; ſomething as if written in the will. 56.

ELEGIT.

Return of a delivery of a moiety, without ſaying that it was by metes and bounds, is a good return to an *elegit*. 231. 233. *n*.
Return of a delivery of a moiety by metes and bounds, is a good return to an *elegit*. 234. *n*.

See CUSTODIAM. 27. 28. 29. 39. PAPIST. 4.

EVIDENCE.

1. *Qu*. What evidence is ſufficient of the loſs of a ſhip, in an action againſt the inſurer. 93.
2. Publiſhing a libel is evidence to go to a jury, of the publiſher having made it. 89.
3. The drawer of a bill of exchange is not admiſſible, in an action againſt the acceptor by the payee, to ſhew that the bill was given for an illegal conſideration. 196. *n*.
4. Upon the trial of an action for a malicious proſecution; the record produced, was of an acquittal of the plaintiff, before two judges different from thoſe before whom it was ſtated to have been in the declaration. This held a fatal variance. 214.
5. Before a party can be permitted to give evidence of the contents of a deed, he muſt prove the loſs of it. 263.
6. Parol evidence is not admiſſible to ſhew that a teſtator intended to exempt his perſonal eſtate from the payment of debts. 327. 328. 482.
7. A ſurviving nominal partner, is not competent to be a witneſs in ſupport of an action by the executor of the deceaſed partner, for a partnerſhip debt. 380.
8. The recital of articles before marriage, and of payment of part of the wife's portion as a conſideration, in an old ſettlemement made after marriage, is *primâ facie* evidence of the articles and of the payment; and therefore that the ſettlement was not voluntary; and there being no evidence to contradict it, the judge is right in directing the jury to find for the ſettlement. 388.

See

See ACCESSORY. 2. BILL of EXCHANGE 2.

EXCEPTIONS.

1. If exceptions to a report be not warranted by objections made before the officer, advantage is to be taken of that, upon the arguing of the exceptions, not by a motion to ſet them aſide; in the *exchequer*. 241.
2. Exceptions do not lie to an officer's report, in the *exchequer*, upon an interlocutory order. The mode of objecting to ſuch report is by moving to ſet it aſide. Otherwiſe in caſe of a report upon a final order. 242.

See ATTACHMENT.

EXECUTION.

1. There are ſeven ſorts of execution; 1. Upon a *ſtatute-merchant*. 2. On a *ſtatute-ſtaple*. 3. Upon a *recognizance*. 4. An *elegit*. 5. Upon a *capias ad ſatiſfaciendum*. 6. A *fieri facias*. 7. A *levari*. 26.
2. Where the heir confeſſes aſſets, the land itſelf might be delivered to the creditor, except the creditor were excluded by law from holding land. 26.
3. The ſheriff withholding money levied on an execution, after demand, is liable to pay intereſt for it at the rate of £.10 *per cent.* and treble coſts. 92.

See PURCHASE.

FINES. See SHERIFFS ACCOUNTS.

FORFEITURE. See VOID AND VOIDABLE.

GUARDIAN. See INFANT.

HABEAS CORPUS. See BAIL. 3. 4.

I.

INCUMBRANCES.

Where a tenant for life pays an incumbrance affecting the lands, it is to be preſumed that he means to keep it on foot for his own benefit; otherwiſe where a tenant in tail pays an incumbrance on the lands. See 61, &c.

INFANT.

In the *exchequer*, upon the return of an attachment againſt an infant defendant in equity, for want of an appearance; the court will appoint a guardian to appear and anſwer. 301.

The defendant's mother having appeared as his guardian, though not really ſuch; the court refuſed to ſet aſide the appearance on that ground. 386.

A teſtamentary guardian can make a leaſe of the infant's lands, to continue during the minority. 607.

INFORMATION.

1. Information for ſpeaking opprobrious, malicious, and contemptuous words of a juſtice of peace in the execution of his office, in diſperſing rioters; for queſtioning and denying his authority; and for obſtructing and hindering him from diſperſing them and preſerving the peace, held to be too general. 612.

2. Whether ſuch information ought to ſtate the offence to be done *vi et armis*. 612.

INSOLVENT.

The duplicate, unleſs ſomething appear on the face of it to impeach it, is concluſive evidence of the defendant's diſcharge. 60.

But if the diſcharge appear to have been obtained by forgery, the court will allow time for an application to ſet aſide the duplicate. 60.

INTEREST.

INTEREST.

1. Upon a bill againſt an adminiſtrator, for a diſtribution, the houſe of Lords having reverſed part of the chancellor's decree appealed from by the defendant as to a particular point, and affirmed it in all others; the decree having given no direction as to intereſt on the diſtributive ſhares, the court of Chancery is precluded from giving, upon a rehearing, any direction reſpecting it, down to the time of the decree and affirmance. 528.

2. The decree being drawn up, without any direction reſpecting ſuch intereſt, according to a draft ſettled and brought into court by the plaintiff's own counſel, he is concluded by it from ſetting up a claim of intereſt. 559.

3. A charge of debts on real eſtate does not intitle ſimple contract debts to carry intereſt. Otherwiſe where the debtor has done ſomething in nature of a ſpecialty, as creating a truſt term in his life time, for payment of debts, and annexing a ſchedule of them. 528. 536. 537.

See EXECUTION. 3.

The KING. See COVENANT. 1.

L.

LIMITATIONS, *Statute of.*

For lease, ſee renewal.

1. To a declaration on a promiſſory note payable three months after date, the proper way of pleading the ſtatute is by pleading *actio non accrevit infra*, &c.

2. *Stat.* 25 *Geo.* 3. *ch.* 34. ſ. 108. which requires that actions againſt revenue officers ſhall be brought within three months after the cauſe of action, did not affect cauſes

cauſes of action accrued before the beginning of that ſeſſions. 468.

See PRACTICE. 2.

M.

MONEY.

1. Where money is to be laid out in purchaſe of lands only as a more ſecu.e fund, for certain purpoſes, it and the land itſelf if purchaſed, is ſtill to be conſidered as money, and the heir cannot claim it. 61, &c.
2, Where a plaintiff applies for a ſum of money on the credit of an award pleaded in the defendant's anſwer; but which the plaintiff impeaches in his affidavit; he ſhall not be allowed any. 107.

MORTGAGEE.

A mortgagee, who has a bond as a collateral ſecurity, under a decree of foreclоſure and ſale, receives part of his debt, by ſale of part of the lands. The mortgagor having become bankrupt, the mortgagee upon giving up all remaining benefit of the decree, may come in for the deficiency under the commiſſion. 518.

See EJECTMENT. 7. CUSTODIAM. 31. 32.

MURDER. See ACCESSORY.

N.

NEW-TRIAL.

1. Motion for new trial allowed to be made after the time limited by the rule, the delay having been occaſioned by the miſconduct of the other party. 77.
2. Within what time new trials muſt be moved for in the *Exchequer*. 78. *n.*
3. *Note.* The rule there mentioned has been ſince altered; and by rule of *Michaelmas* Term 1788, all motions to ſet aſide verdicts or nonſuits, ſhall be made within the firſt ſix ſitting days of the term next after ſuch verdicts or nonſuits ſhall have been obtained.
4. Order of Chancery to ſtop after verdict, is no reaſon for not obſerving the rule; for that order means an unimpeached verdict. 78.
5. New trial, applied for on the ground of exceſſive damages, refuſed. 79. 99.
6. Where there is a reaſonable doubt that juſtice has not been done, there ought to be a new trial that the matter may undergo the conſideration of another jury. 93. 243.
7. New trial applied for upon objections to the judges charge on a challenge to the array for want of due ſummons, refuſed. 100.
8. New trial granted in an action for a libel, where the verdict for the defendant was contrary to evidence. 260.
9. Verdict ſet aſide as being contrary to the weight of evidence. 268.
10. The finding of damages ſet aſide, becauſe the jury, without further evidence had increaſed them, in order to reimburſe the plaintiff the coſts he would be obliged to pay to another defendant for whom they found a verdict. 292.

P.

PAPIST.

1. A papiſt, ſeiſed in fee, previous to her marriage with the plaintiff (a papiſt,) in conſideration of the marriage, and of his covenanting to make up her dower £.800 *per ann.* and to provide for younger children, covenants for her and her heirs to pay £.8000 as her marriage portion to be applied in procuring aſſignments of charges on his eſtate, in truſt for the iſſue of the marriage, and in default of iſſue for the plaintiff; £.4000 of the £.8000 is paid; the marriage takes place and the wife dies without iſſue, and without perſonal property: whereupon her lands come to her ſiſters (papiſts) her heirs at law; againſt whom the plaintiff files his bill to recover the reſidue of the £.8000. He is decreed intitled to it againſt the ſiſters in reſpect of the lands ſo come to them. 15.

2. The lands in ſuch caſe were real aſſets. The ſiſters took them as heirs, not as purchaſers under the ſtatute of *Anne*. *Ibid.*

3. "*Purchaſers*" in 2 *Ann. c.* 6. means purchaſers by bargain and ſale, for valuable conſideration. 23.

4. It has not been *adjudged* that a papiſt cannot take by mortgage, ſtatute ſtaple, ſtatute merchant, or by *elegit*, 23.

5. 1 *Ann. ch.* 32. which makes void leaſes and aſſignments thereof to papiſts of forfeited lands, relates only to thoſe forfeited. A. D. 1688. 81.

PATENT.

1. The paſſing of a patent may be oppoſed; 1ſt. whilſt it is under the conſideration of his majeſty: 2dly when it comes to the privy ſeal: 3dly when it comes to the great ſeal. 502.

2. Upon an application to the chancellor to withhold the great ſeal from a patent, he will only conſider whether the patent be legal or not—not the propriety of granting it or not. 499.

PAYMENT.

Payment made on account of rent generally, properly left to the jury to determine to what period it is to be applied. 81.

PEER, *Engliſh.*

The anſwer of an *Engliſh* peer muſt be on oath, unleſs the plaintiff conſent to take it upon honour. 106.

PERAMBULATION.

1. Commiſſioners of perambulation muſt make a return If they cannot agree in making it, they may report ſpecially. 112.
2. Before they make ſuch return or report, the court will not grant a new commiſſion, upon the allegation of their diſagreement. *Ibid.*

PLEADING, *at Law.*

1. Declaration in debt for £.130 "*the reſidue* of a year's rent" of £.180 without expreſsly ſtating that the other part was ſatisfied, held good after verdict. 81.
2. The word *reſidue* ſeems a ſufficient acknowledgment that the reſt was paid. *Ibid.*
3. Declaration in covenant for part of a quarter's rent, without ſhewing that the reſt was paid, is bad, on ſpecial demurrer. 374.
4. An executor pleads a judgment outſtanding, and *nul aſſets ultra*; plaintiff replies *aſſets ultra*; upon this iſſue the defendant may cover aſſets to the amount of the judgment, though it be for the penalty of a bond conditioned for the payment of a leſs ſum. 88.
5. An avowry for rent under 26 *Geo. 2. ch.* 13. ſ. 4. need not ſtate by whom the demiſe under which the premiſſes are ſtated to have been held, was made. 127.
6. The form of an avowry held to be good under that ſtatute. 127.
7. That ſtatute extends to parol demiſes. 132.
8. In an action againſt a ſheriff for a falſe return of a *fieri facias*, the declaration need not aver that the debt was unſatisfied at the time of ſuing out execution. 220.

9. In covenant for rent on a leaſe for a certain number of years, if certain perſons named lived ſo long, the implication of the continuance of the lives, from the averment that ſo much was due for ſix years and an half's rent, held to be ſufficient, on general demurrer. 224.

10. An adminiſtrator's pleading *non aſſumpſit* ſingly is an admiſſion of aſſets. 230.

11. Aſſignment of a leaſe may be laid without a *venue*, for it is to be preſumed to have been made on the land. 375.

12. An avowry for arrears of a rentcharge need not ſtate, that at the time of granting it the lands were not in leaſe. 497.

13. In debt for rent, defendant confeſſes part, and as to the reſt pleads eviction by title paramount, for non-payment of rent, and that he continued diſpoſſeſſed ſo long. The replication, admitting the eviction, ſtates that the plaintiff redeemed, and traverſes the continuance of the diſpoſſeſſion. Defendant rejoins that he was evicted and continued diſpoſſeſſed, as before. Special demurrer thereto, for tendering an iſſue as well on the eviction, which was admitted, as on the continuance of the diſpoſſeſſion, over-ruled. 505.

14. Avowry for arrears of a rent-charge granted *for life* of grantee, by a *termor for years*, without averring that the grantee became *ſeiſed*, &c. therefore held good. 515.

15. In the ſame caſe the avowant ſtated that the grantor's term was made by a tenant for lives; and it was held that *profert* of the deeds by which the leaſe for lives was made, was not neceſſary.

See ACCESSORY. 1. 3. AMENDMENT. ASSUMPSIT. BILL OF EXCHANGE. 1. COVENANT. DEBT. DEMURRER. 6. 14. DEVISE. 5. INFORMATION. LIMITATIONS. 1. RECOGNIZANCE.

PLEADING IN EQUITY.

Demurrer lies to a bill for want of intereſt in a defendant, and that he might be examined as a witneſs. 514.

See DEMURRER. 1. 2. 3. 4. 5.

POSSESSORY-BILL.

The injunction to the party is only to bring him into court. He may diſobey it, but muſt anſwer interrogatories as under an attachment: and then the court decides upon the right. If againſt the defendant, he is in abſolute contempt, and the court will not take off the attachment till he abates the nuſance. 303.

PRACTICE.

1. A plea to a bill being allowed, the cauſe is out of court, and a ſubſequent order intitled as in that cauſe is irregular. 87.
2. When a regular judgment by default is ſet aſide upon the terms of defendants pleading iſſuably; plea of the ſtatute of limitations is not within thoſe terms. The plea muſt be to the merits. 99.
3. In the *Exchequer*, the ſerjeant at arms, offering to aſſign the bail-bond, or to ſue upon it, is not bound to bring in the body of the defendant. 105.
4. Retaining a bill for a year, means that it is to be retained until the merits ſhall have been tried. 107.
5. The conditional order for filing a ſupplemental bill ſtating new matter diſcovered ſince the decree, muſt ſpecify the new matter ſought to be put in iſſue 107.
6. The bill being to revive and anſwer, the plaintiff may revive upon an attachment for want of an appearance; in the ſame manner, as if the bill had only prayed a *ſubpœna* to revive. 109.
7. There is no caſe where a decree on ſequeſtration may not be ſet aſide on terms, to let the defendant anſwer; except where a third perſon may obtain a title in the mean time. 111.
8. The plaintiff being ſtiled *executrix* in the bill and *ſubpœna*, the proceſs of contempt ſtiling her *adminiſtratrix*

is irregular. 114. But the irregularity is cured by the defendant's ſerving a notice of moving for time to anſwer. *Ibid.*

9. A conditional order of two years ſtanding cannot be moved upon. There muſt be a motion *de novo.* 114.

10. The court out of which the record iſſues, will not take cognizance of the ſheriff's neglect to return a *diſtringas* to the judge of *niſi prius*, 194.

11. The defendant by putting a rule on the plaintiff to ſhew cauſe of bail, waves the objection to the want of an affidavit to warrant the marking of the writ. 256.

12. Motion to change the *venue* cannot be made, in the *Exchequer*, upon either of the two laſt days of term. 294.

13. The court will not grant a receiver for an undivided part; but will oblige the defendant to give ſecurity to abide the decree. 301.

14. The court of *Exchequer* will entertain a bill to be relieved againſt a fraudulent demand, though the ſum be under £. 10. 394.

15. The court will not take a bill of the file, on account of the ſum in litigation being trifling; but the defendant muſt demur to it, or move to have it diſmiſſed. 394.

PRISONER.

Civil proceſs may be ſerved an a priſoner under a criminal proſecution, if it do not obſtruct the crown proceſs. 237.

PROHIBITION. See APPEAL.

PURCHASE.

Acquiſition by execution is not conſidered by any writer as an acquiſition by purchaſe.

See PAPIST. 2. 3.

R.

RECEIVER. See CUSTODIAM. 33. PRACTICE 13.

RECOGNISANCE.

A *Scire facias* on a recognizance on error brought by an executor, by which the defendants acknowledge themſelves bound *according to the ſtatute in ſuch caſes*, &c. (whereas no ſtatute requires a recognizance in ſuch caſe,) and ſtating an affirmance of the judgment, an award of coſts and nonpayment thereof, (the recognizance in fact being without any condition,) was held bad on general demurrer. 215.

REHEARING.

An application to the houſe of Lords, to rehear a cauſe decided by them, refuſed. 192.

See INTEREST. 1.

RENEWAL. RENEWABLE LEASES.

1. A great part of *Ireland* is held under leaſes depending on lives with covenants for perpetual renewal. 142.
2. In the ſouth of *Ireland* they have prevailed ſince the great earl of Ormond's time, who introduced them there, to people his eſtates, and to invite a reſpectable and improving tenantry. 143.
3. Such tenants were conſidered to have perpetual intereſts. 143.
4. Where the tenants had neglected to pay the renewal fine in the time preſcribed, equity held them relievable on making compenſation to the landlord, except in caſes of fraud or dereliction. 144.
5. The tenants were held relievable though the leaſes contained expreſs negative clauſes, i. e. that the landlord ſhould not be obliged to renew, unleſs the renewal were

were applied for and the fine paid within the time prescribed after the fall of a life. 145.
6. The reversal, by the Lords of *England*, of Lord *Lifford's* decree, in *Murray* v. *Bateman*, founded on these principles created great dissatisfaction and alarm in *Ireland*. 146.
7. But the *Irish* legislature by 19 & 20 *Geo.* 3. *ch.* 30. recognized and restored the old equity. 146.
8. A lease *for years* determinable on the fall of lives is within the equity of that act. 147.
9. The term's being at an end at law, is quite out of the case in the consideration of a court of equity. 150.
10. Where the parties had always considered an intricate and perplexed clause, as a covenant for perpetual renewal, the court also will give it that construction. 148. 157.
11. In the interval between the reversal of the decree in *Murray* v. *Bateman*, and the passing of the act, Lord Lifford refused relief, where the term was at an end in law, he considering himself bound by the decision of the Lords. 152.
12. And in *Magrath* v. Lord *Muskery*, considering the case, 1st. as coming under that decision, and within the proviso of 19 & 20 *Geo.* 3. *ch.* 30; 2dly, in conformity to a decree of the *Exchequer*, wherein it was held that after the fall of all the lives the tenant had no right to a renewal; 3dly upon the ground of the tenant's misconduct pending the cause, his lordship dismissed the tenant's bill, and the dismissal was affirmed by the Lords of *Ireland*. 166.

RENT-CHARGE.

Rent-charge granted for life, by a termor for years, held good. 515.

See PLEADING at LAW. 12. 14.

RETURN.

A return of *Tarde* need not mention the time when the writ was delivered to the sheriff. 475.

A return of *nulla bona*, muſt purſue the words of the writ, and ſtate that the defendant had not goods, &c. whereout to levy the debt damages and coſts, (theſe being the words of the writ,) or any part thereof. 387.

See ELEGIT. PERAMBULATION. PRACTICE. 10.

REVENUE.

See CUSTODIAM. SHERIFF.

REVENUE OFFICERS.

See LIMITATIONS. 2.

REVIVOR.

See PRACTICE. 6.

S.

SALE.

Not having been ſerved with a copy of the decree for a ſale, is a good cauſe againſt an attachment, for not executing the conveyance to a purchaſer. 113.

In order to ſet aſide a ſale under a decree, there muſt be an affidavit of a greater ſum being offered. 113.

Whilſt conditional orders for attachments are depending againſt the plaintiff and defendant, for not executing the deeds of conveyance to the purchaſer, the creditors who came in under the decree, cannot be paid out of the purchaſe money, though the purchaſer has gone into poſſeſſion. But the court gave them leave to proceed on their ſecurities. 115.

Where a perſon who has made a depoſit upon being declared the highest bidder at a ſale under a decree, is outbid at a ſubſequent ſetting up of the lands to ſale, he is intitled to have his depoſit back immediately; but for his intereſt and coſts, he muſt wait until the ſale ſhall have been completed. 302.

SCIRE FACIAS.

See RECOGNISANCE.

SERJEANT AT ARMS.

See PRACTICE. 3.

SETT-OFF.

Where a teſtator deviſes an annuity to his debtor, the debt is not to be ſett-off againſt the demand of the annuity. 258

SHERIFF. SHERIFF's ACCOUNT.

After the fines laid upon perſons found guilty of an aſſault, had been eſtreated into the *Exchequer*, they obtain a pardon. The court of *Exchequer* refuſed to diſcharge thoſe fines upon a certificate of the conviction and the pardon, but gave leave to enter an *O. ni* upon them in the ſheriff's accounts. 117.

The ſheriff muſt *tot* for fines granted by the crown to a corporation; for they muſt be eſtreated and levied by the proceſs of the *Exchequer*, and cannot be paid to the corporation in the firſt inſtance. 120.

See ELEGIT. EXECUTION. PRACTICE. 10. RETURN.

SUMMONS OF JURORS.

See NEW TRIAL. 7.

T.

TENANT AT WILL.

See EJECTMENT. 8.

TRAVERSE.

See CUSTODIAM. 24. 31. 32. 36. 37. 43.

TRIAL AT BAR.

Cannot be moved for on the laſt day of term, in the *Common Pleas.* 496.

U.

USE AND OCCUPATION.

See ASSUMPSIT.

V.

VARIANCE.

In B. R. on a criminal information the award was of a *venire* returnable "*at the King's courts,*" &c. the

venire was returnable "*whereſoever*, &c." this variance held fatal in arreſt of judgment. See 612, &c.

See EVIDENCE. 4.

VENIRE.

Three defendants to an information plead ſeverally, not guilty; and the *venire* (a joint one) is "to try *the iſſue aforeſaid*." *Qu.* the validity of the objection thereto in arreſt of judgment. See 612, &c.

See VARIANCE.

VENUE.

See PLEADING AT LAW. 11. PRACTICE. 11.

PH
MVSEVM
BRITANNICVM

VI *et* ARMIS.

See INFORMATION. 2.

VOID. VOIDABLE.

1. Where a forfeiture has been completed and thereby the eſtate abſolutely avoided, the forfeiture cannot be waved by parol ſo as to ſet up the grant. Otherwiſe where there is a mere election given to render the act act or omiſſion a forfeiture, and ſome further act is requiſite to complete the forfeiture. 414. 456.
2. Freehold leaſes require an entry to avoid them; but as to leaſes for years, in the caſe of a collateral condition or covenant, where no re-entry is declared to be neceſſary; but it is declared by the inſtrument that upon a breach of the condition the intereſt ſhall be void, waver by parol, after a breach, will not eſtabliſh it. 414. 456
3. But if the leſſor before a breach diſpenſe with the performance of the condition, he cannot avail himſelf of the breach, 402, &c.

W.

WILL.

See DEVISE.

THE END.